

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

For the Plaintiffs:	WATJE & MOORE, LTD. STEVEN C. MOORE, ESQ. 7900 Xerxes Ave. S, #2000 Bloomington, MN 55431
For the Defendant:	FREDRIKSON & BYRON, PA RICHARD D. SNYDER, ESQ. 200 S. 6th St., #4000 Minneapolis, MN 55402-1425
Court Reporter:	DEBRA BEAUV AIS, RPR-CRR 300 S. 4th St., #1005 Minneapolis, Minnesota 55415

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 **P R O C E E D I N G S**2 **IN OPEN COURT**

3 THE CLERK: All rise. United States District
4 Court for the District of Minnesota is now in session, the
5 Honorable Patrick J. Schiltz presiding.

6 THE COURT: Good morning. Please be seated. All
7 right. We are here this morning on the case of Webb Candy,
8 Inc. and Licensed Sports Marketing, LLC v. Wal-Mart Stores.
9 The case is Civil No. 09-2056.

10 If I could have the attorneys make your
11 appearances, please, beginning over here (indicating).

12 MR. MOORE: Good morning, Your Honor. Steve Moore
13 on behalf of the plaintiffs.

14 THE COURT: Good morning, Mr. Moore.

15 MR. SNYDER: Good morning, Your Honor. Richard
16 Snyder on behalf of defendant Wal-Mart.

17 THE COURT: We have cross-motions today.
18 Mr. Snyder, why don't I talk to you first, if I could.
19 Thank you both for making your way in on a bad day today.

20 MR. SNYDER: It was a little bit of a white
21 knuckle experience.

22 THE COURT: It was for me as well. My whole
23 family is in the Dominican Republic right now, except for my
24 son. So I had to wait for his school bus and then try to
25 make it. I didn't make it in by a lot to spare today. Who

1 knew at the end of March we would have to deal with this.

2 Mr. Snyder, let me ask you first -- there is a lot
3 of briefing back and forth on the issue of the authority of
4 store managers. And I can't tell whether we have a
5 disagreement about this or not. Does a store manager at a
6 Wal-Mart store have the authority to order a local product,
7 such as lip balm with a high school name on it, as long as
8 the vendor offering that product has an approved number, has
9 a vendor number?

10 MR. SNYDER: The local program permits store
11 managers to buy products on a local level. So they have the
12 authority to do that. Not just anyone can come in and sell
13 a product to a Wal-Mart store.

14 THE COURT: Has to be an approved vendor?

15 MR. SNYDER: Yes.

16 THE COURT: We spent a lot of space on this in the
17 briefs. I couldn't tell if you disagreed or not. I don't
18 know why -- I don't mean to be critical of you, but your
19 brief seemed cagey on this point. You briefed the national
20 program. You say national this, national that, but they
21 have never claimed that they went through corporate or that
22 this was -- they were approved to go through corporate, but
23 they claim that. I understand the whole dispute here is
24 over the fact that Webb Candy wasn't a licensed Wal-Mart
25 marketer.

1 So if it had been an approved vendor, had an
2 approved number, there would have been nothing wrong with
3 taking these particular products into local store managers
4 and trying to persuade store managers to order, right?

5 MR. SNYDER: It still has to be vetted through the
6 buyer. Anything going through the store is being vetted by
7 a buyer.

8 The difference between the national program and a
9 local program is under the national program the buyer
10 actually manages all aspects of the sale, including making
11 sure that the stores are stocked with the product.

12 On the local program that responsibility goes to
13 the store manager. So if they want more, they have to
14 reorder it or they have to maintain their own inventory and
15 pay attention to it themselves.

16 But it doesn't mean that they can go out and just
17 buy any product that they want. If someone pulls up with a
18 truckload of chainsaws, I mean, they can't buy it even if
19 it's a good deal. It has to go through and be approved by
20 Wal-Mart's home office.

21 THE COURT: Well, I'm not sure I'm tracking with
22 you. But for certain categories of things, like postcards
23 or like T-shirts with the local high school's insignia on
24 it, the store manager can buy those, can make the decision
25 to buy those from somebody that has a vendor -- who has been

1 approved as a Wal-Mart vendor, right?

2 MR. SNYDER: Yes.

3 THE COURT: And he doesn't have to go get a buyer
4 in Arkansas or somewhere else to approve it. The store
5 manager can look at the T-shirts and say as long as they fit
6 within these categories of local -- I realize he can't buy
7 Hanes underwear from a local person.

8 The thing I want to make sure I have a clear
9 answer, if Webb Candy had had a vendor number from Wal-Mart,
10 if its application a couple years earlier had been approved
11 and it had a vendor number, it could have taken these lip
12 balms with the high school insignia on it to local managers
13 and local managers could have made a decision about whether
14 to stock them in their store, right?

15 MR. SNYDER: No, not on something like this. You
16 know, this is a product you are putting on your mouth. I
17 mean, this isn't a T-shirt.

18 THE COURT: Yeah, but it has the local high school
19 teams on it.

20 MR. SNYDER: It's not apparel.

21 THE COURT: So I believe --

22 MR. SNYDER: They point to something in the 70
23 program or 70-type transactions that says it's appropriate
24 for high school apparel. It says that.

25 But I don't think there is anything in the record

1 that says that someone can get anything into a store without
2 a buyer at least saying it's okay. Now, for an object like
3 that, that might not be a big deal for a store manager to
4 call up and say this person wants to participate in our
5 local program. The product looks fine. And the buyer could
6 take a very hands-off approach in that instance. But it's
7 still going through a buyer in every instance, Your Honor.

8 THE COURT: So these products were stocked in over
9 900 Wal-Mart stores; is that correct?

10 MR. SNYDER: It's a large number.

11 THE COURT: Is there any evidence that any of
12 those store managers ever called down to Arkansas, sent one
13 of the lip balms with the high school insignia on it and
14 asked a buyer to approve the product?

15 MR. SNYDER: No, I'm not aware that happened.

16 THE COURT: You mean 900 store managers aren't
17 aware of the policy that you just told me exists in
18 Wal-Mart?

19 MR. SNYDER: Well, I think they were telling the
20 store managers that they are selling -- they're an
21 authorized vendor to supply this product. The vendor --
22 maybe the confusion is that the supplier authorization is
23 product specific really. So when you go and go through this
24 national program or this local program and you submit your
25 product through the online application process and have it

1 reviewed by a buyer, it's for a product. It's not for we're
2 a vendor, we can supply any range of products.

3 THE COURT: I know it's me. I'm not try to
4 express any criticism of you, but I'm really having trouble
5 following this.

6 When I go to Wal-Mart in Charlottesville and I am
7 Jockey and I want to provide Jockey underwear, I assume the
8 buyer has to approve it, the Arkansas buyer, the corporate
9 buyer, right?

10 MR. SNYDER: The buyer for Jockey underwear has to
11 approve --

12 THE COURT: Right, and then Jockey would ship
13 massive shipments to somewhere and it would be distributed
14 to Wal-Mart stores. That's the way it would typically work,
15 right?

16 MR. SNYDER: Right.

17 THE COURT: If I was Jockey and I showed up to the
18 Apple Valley Wal-Mart store with a truck full of Jockey
19 underwear, I assume the local manager wouldn't buy the
20 underwear from me. He would say that has to go through
21 corporate, through the regional distribution centers, right?

22 MR. SNYDER: Well, it depends on what the supplier
23 wanted to do. If the supplier wanted to supply just a
24 limited geographical region -- it's ten districts or less --
25 then they can sell that through the local program. But it's

1 still going to be vetted through the buyer, and the buyer is
2 going to say whether or not they want that and whether the
3 stores are okay to purchase it or not. So the buyer is
4 always involved, even for a program like that.

5 THE COURT: What I am having trouble understanding
6 here is that these folks convinced 900 Wal-Mart store
7 managers to stock their products, their lip balms and their
8 hand sanitizers. I understand that, in your view, they did
9 it by misrepresenting that they were an approved vendor.

10 There is no evidence that any of those managers
11 ever contacted corporate Wal-Mart about anything with -- I
12 know there is like three or four, maybe more, that said they
13 got product, but I just mean the typical thing here.

14 So how can you reconcile that with what you are
15 telling me, which is you're telling me that the store
16 managers would have understood not just that the vendor was
17 approved, but that the local high school lip balm was
18 approved?

19 MR. SNYDER: I think that's probably what
20 happened. I don't have evidence that anyone called the
21 buyer and said can we get this stuff.

22 THE COURT: Obviously, the managers thought that
23 they had the authority to order these things. Nine hundred
24 of these managers thought they had the authority to order
25 these things.

1 MR. SNYDER: Yeah, I can't dispute that.

2 THE COURT: So if Webb Candy had had a vendor ID
3 number, would you be claiming that the sales were
4 unauthorized of these products? If Webb Candy had at some
5 point gotten a vendor ID number and these particular
6 products hadn't been vetted by corporate, would the local
7 store managers have had the authority to buy these
8 particular products from Webb Candy?

9 MR. SNYDER: I don't know the answer to that
10 hypothetical.

11 THE COURT: Okay.

12 MR. SNYDER: That's not the facts of our case. So
13 would they have had the authority to purchase? They can
14 purchase on a local level from authorized suppliers.

15 THE COURT: You're not arguing in this case, in
16 any event, that among the reasons that you have no
17 contractual obligations to Webb Candy is that store managers
18 didn't have the authority to buy this product even if Webb
19 Candy had a vendor ID number? You are resting your case on
20 the fact that they didn't have a vendor ID number?

21 MR. SNYDER: Yeah, on the facts of this case.
22 That's correct.

23 THE COURT: Let me ask you this then: Suppose you
24 have a vendor like LSM that has a vendor ID number. Can
25 they sell products to Wal-Mart that they personally didn't

1 manufacture -- that is, can they buy products from other
2 people and sell them to Wal-Mart through their vendor
3 number?

4 MR. SNYDER: Well, I think that's not a complete
5 hypothetical in the sense that we don't know whether these
6 products have been looked at by a buyer at the home office.
7 But, as a general matter, you don't have to be the
8 manufacturer of the product in order to sell it to Wal-Mart.
9 Wal-Mart works with intermediate entities in the supply
10 chain, from manufacturer to the retail store. So they are
11 buying from an entity that did not itself manufacture the
12 product but has sourced it somewhere else, so that happens.
13 If that's your question, that happens.

14 THE COURT: Suppose LSM buys these lip balms from
15 Webb Candy, and LSM goes down to Arkansas and it makes a
16 pitch to the lip balm buyer in Arkansas and he says great,
17 we will take them, and LSM then ships cases of Webb Candy
18 lip balms around the country. I assume all that would be
19 fine, right?

20 MR. SNYDER: Yes. In that instance what has
21 happened is Wal-Mart has a contractual relationship with the
22 actual supplier of the product. It's signed onto its
23 Supplier Agreement. It's going to indemnify Wal-Mart in
24 case there is a product-liability claim. It's going to have
25 its own product liability insurance. The product is going

1 to be tested, and there is going to be evidence that this
2 product is safe to put on your lips. Under that
3 circumstance, the buyer has gone through the process and
4 says if the buyer signs off on it, it's not a problem. He
5 could have bought the same candy -- or the same product.

6 THE COURT: Suppose someone like an LSM brings,
7 you know -- wants to distribute lip balms and it goes down
8 to whoever makes them, it goes down to Wal-Mart and Wal-Mart
9 says great, we want to distribute your product. So it gives
10 them a vendor ID number and it buys however many million
11 cases of lip balm. Okay? And then suppose a couple years
12 later that LSM develops another product. Do they have to
13 get that product approved before they can sell it to
14 Wal-Mart?

15 MR. SNYDER: Yes. Jason Mayhall, one of the
16 buyers, the buyer for lip balm actually in this case, was
17 responsible for lip balm, went and rejected this product,
18 said -- was asked that very question and he said that they
19 have to come back and get -- there's a new number that they
20 are going to get and he called it, I think, a sequence
21 number. So in order to get this into the system, Wal-Mart
22 system to pay, you are going to have to have a number that
23 you are associating with this particular new product now.
24 So it is buyer approved. And, like I said, I think
25 everything is supposed to be buyer approved in the system.

1 THE COURT: Okay. So even though Wal-Mart gives
2 vendor numbers and approves vendors, at least when you are
3 selling at the corporate level you also have to get
4 product-by-product approval?

5 MR. SNYDER: And the local level, too. The
6 material we submitted from their web page talks about the
7 local program.

8 THE COURT: Yeah. Okay. If I understand it here,
9 there is three ways that you, as a distributor, can get a
10 product into a Wal-Mart store: One is through the national
11 program. One is through the local program, which is
12 regional or 10 stores or less or something, I can't remember
13 how it was. But then there is this -- and I know there is a
14 dispute over exactly what this means, but it's what Webb
15 Candy has referred to as this 70-type procedure, which is
16 where a vendor shows up at the local Wal-Mart, talks to the
17 store manager and persuades the store manager to order
18 something directly from the vendor, which is delivered
19 directly to that store. Obviously, there must be some
20 ability for store managers to do that because 900 of them
21 did it in this case. Right?

22 MR. SNYDER: Yes, but it's not a separate program.
23 I mean, there is nothing that anyone has presented to the
24 Court, because nothing exists, that says anyone can come in
25 and make a sale to a Wal-Mart store in that fashion.

1 THE COURT: No, I'm assuming somebody that has a
2 Wal-Mart vendor number. But, at least in this case, store
3 managers believing they were dealing with somebody with a
4 vendor number had them show up or make a phone call and
5 ordered from them directly and had them ship products
6 directly to the store. Now, that wasn't through the
7 national program and that wasn't through the local program.
8 That was some kind of a direct vendor-to-store transaction,
9 right?

10 MR. SNYDER: Through the local programming.
11 That's how you would normally do that. They're
12 circumventing the rules here. I mean, the rules are what
13 they are, and you are supposed to do this.

14 Now, they are approaching these stores and they
15 are making these sales, misrepresenting who they are. And,
16 you know, that's not anything that's authorized according to
17 the rules.

18 THE COURT: I understand that. I want to try to
19 separate the issue of the misrepresentation from what
20 authority the store managers have. I'm not sure whether I
21 have quite nailed you down on this or not.

22 If I have a Wal-Mart vendor ID number and I have a
23 product that is of local interest, like postcards or like
24 lip balms with this high school logo on, can I call the
25 store manager directly and is the store manager authorized

1 to make the decision himself to stock my product, my local
2 product? I don't mean "local" in the Wal-Mart way. I mean
3 "local" meaning it's the Apple Valley High School team. Do
4 store managers have that authority?

5 MR. SNYDER: They have the authority to purchase,
6 again, you indicated from a supplier that has been
7 authorized.

8 THE COURT: Uh-huh.

9 MR. SNYDER: Normally what that means is that the
10 product that that supplier is selling has been authorized as
11 well. So when a store manager hears that, yes, I'm an
12 authorized supplier, it's not that I am this class of entity
13 that can sell anything to Wal-Mart, but the store manager
14 understands in that instance, based on Wal-Mart's rules, is
15 that that entity is authorized to sell this particular
16 product that they're selling.

17 THE COURT: But there is no indication -- but you
18 said -- a vendor gets product-specific approval, but what
19 tells the -- if the store manager can only buy approved
20 products from an approved vendor, someone with a vendor ID
21 number, wouldn't the store manager have to ask the person
22 calling them not only are you with LSM, but is this lip balm
23 you are asking about an approved product?

24 MR. SNYDER: Well, I think the two things are
25 interrelated. So that's why I'm thinking --

1 THE COURT: I could be LSM and I could sell a
2 thousand products, one of which Wal-Mart has agreed to buy
3 from me and distribute, 999 of which it doesn't. So when I
4 show up to a store manager and I've got a vendor ID number,
5 it does say whether that means Wal-Mart has vetted all my
6 products or one of 1,000 I sell. So wouldn't a store
7 manager have to know whether the particular product you were
8 selling was approved by a Wal-Mart buyer?

9 MR. SNYDER: Well, as I indicated, I think it's
10 one in the same thing in the mind of a store manager. If
11 you are presenting yourself -- I have a product, I'm an
12 authorized supplier of this product is really what they are
13 saying. That's the message they are conveying when they
14 call up these people. I don't know expressly if there was a
15 discussion back and forth with the store manager, have you
16 been approved for this particular product or who is the
17 buyer for this particular product that approved this. I
18 don't know if those conversations happened, but --

19 THE COURT: What, I guess, I'm having trouble with
20 is if the assumption that the store manager is making is
21 that when I'm at -- if I am Mr. Henson and I call and I say
22 I'm with LSM and I have got some lip balms with high school
23 logos that we'd like to stock, if the manager is assuming
24 that that product has been approved by Wal-Mart, then why
25 isn't the product coming through the Wal-Mart distribution

1 centers rather than -- I would say, well, why are you
2 calling me?

3 MR. SNYDER: Because the local programs -- you're
4 making local sales that aren't going through these
5 distribution centers because they are locally focused. I
6 wish I could address your question, but I think I have. I
7 mean, the answer is that someone presents themselves as an
8 authorized supplier. They have a product. Right? The
9 assumption is they have been authorized for that product.

10 Now, could a store manager have called and talked
11 to a buyer? I suppose they may have done that.

12 THE COURT: Okay. So you're saying that when a
13 store manager at whatever, the Cleveland Wal-Mart store,
14 gets a call and someone says, I'm Joe Blow, I'm with LSM and
15 I have got some lip balms I would like you to carry that he
16 understands the person saying I'm Joe Blow, I'm with LSM and
17 these lip balms have been vetted by a Wal-Mart buyer and a
18 Wal-Mart buyer has approved?

19 MR. SNYDER: Exactly. It would be crazy for a
20 supplier not to do that. So if you have gone through the
21 process of becoming a Wal-Mart supplier, you have got this
22 coveted number now, are you going to jeopardize it by
23 violating Wal-Mart's rules and going out and selling
24 products that are renegade products that have never been
25 approved by anyone? I think everyone would assume that if

1 you have that number, you have been approved for a product
2 and the product you are offering has been vetted because no
3 one would risk violating the rules and getting kicked out of
4 the program if that is not the case.

5 THE COURT: Except that Little i did and LSM did.

6 MR. SNYDER: They were making minor sales at that
7 point in time, and I think they realized their days at
8 Wal-Mart were done. LSM wasn't selling anything actively at
9 the time, I don't believe --

10 THE COURT: Okay.

11 MR. SNYDER: -- or if they did, it was minor.

12 THE COURT: Okay. I think that that helps me.

13 All right. Let me just look at my notes here for
14 a second.

15 Okay. Let me talk about your fraud claim. Let me
16 walk through the defenses that Webb Candy has thrown up to
17 your fraud claim.

18 First, Webb Candy argues that there was no
19 misrepresentation. The heart of your misrepresentation
20 claim is that basically a salesman would call and say that
21 they were with LSM or with Little i and that was a lie. It
22 was implying that they were employees of approved vendors
23 and they weren't employees of approved vendors, right?

24 MR. SNYDER: And implying that this is an approved
25 product, that they have permission to sell this, and that

1 they have a vendor number.

2 THE COURT: But your briefs I don't recall
3 focusing on this issue, that the lie is that this was an
4 approved product. Your brief focuses on the fact that they
5 say that they're with somebody that has a vendor number.
6 The whole focus of your brief is how important it is that
7 the vendor be vetted, how important it is that the vendor be
8 someone Wal-Mart have confidence in. I mean, your brief
9 focuses on the fact that they are saying that they're
10 employed by an approved vendor when they were in fact
11 approved by somebody who wasn't an approved vendor.

12 MR. SNYDER: I didn't follow the last part.

13 THE COURT: The lie that is the focus of your
14 brief, not exclusively, but the focus of your brief is these
15 people were calling and saying they were employed by --
16 implying that they were employed by an approved vendor when
17 in fact they were not employed by an approved vendor.

18 MR. SNYDER: It's not just that. The product that
19 they are selling -- that Webb Candy or that LSM were making
20 the call saying that they're an authorized supplier. I
21 mean, that's the lie that -- the lie is that the Wal-Mart
22 store has the right to do business with this entity making
23 the sale when that's not the case. So employed, not
24 employed, that's part of it, but the central lie is that
25 when you do business, when you form this contract, you are

1 forming a contract with an entity called LSM, which you are
2 authorized to enter into contracts with.

3 THE COURT: Here's a question that bothered me
4 reading the papers: Didn't they form a contract with LSM?
5 In other words, when a local store manager agreed to stock
6 this Webb Candy product and he got the invoice from LSM and
7 he sent the payment to LSM, wasn't he in fact in a
8 contractual relationship with LSM? In other words, if
9 something had gone wrong, couldn't you have sued LSM?

10 MR. SNYDER: I think that's the restatement we
11 cite that talks about that. That's enough to form a
12 contract, but it's a voidable contract. So it's not the
13 situation where the fraud is about some other issue that's
14 more fundamental that makes it void from the get-go. This
15 is the kind of fraud that makes it voidable. So, yeah, you
16 are right, there is a contract, but it's a voidable
17 contract.

18 THE COURT: So there is a contract between a -- so
19 there is a contract -- but so much of your brief talks about
20 they think they're making a contract with an approved
21 vendor, they think they are making a contract with an
22 approved vendor, they were making a contract with an
23 approved vendor. I mean, there wasn't -- the misleading --
24 this is a very, very odd case in lots of ways, one of which
25 is, is that the fraud here as portrayed in your brief is

1 that through their lies the Webb Candy people led the
2 managers to believe that they were making a contract with
3 LSM. Well, they were making a contract with LSM. I mean,
4 there wasn't a -- that's -- I don't quite understand --

5 MR. SNYDER: But LSM wasn't the real party to the
6 contract is the problem.

7 THE COURT: What do you mean? They were on the
8 contract. I mean, I assume, and you agree, that you
9 could've sued them. They were obliged, that they have would
10 have all the obligations they have under the Wal-Mart
11 Supplier Agreement or under the contract.

12 So it's hard for me to grasp what the fraud here
13 is in that if the fraud is they are inducing people to make
14 contracts with someone that is an approved vendor -- they
15 did make contracts with someone who is an approved vendor,
16 so where is the --

17 MR. SNYDER: They made a contract with Webb Candy.
18 Webb Candy supplied the products to them. Webb Candy --

19 THE COURT: How did they make a contract with Webb
20 Candy?

21 MR. SNYDER: Webb Candy owned the products. Webb
22 Candy, they own the products. They did every part of the
23 sale. That is the entity -- Webb Candy shipped the stuff.
24 Licensed Sports Marketing is sitting off on the side here.
25 It's not doing anything.

1 THE COURT: It made a contract with you. The
2 contract is with LSM. In fact, I wonder whether in this
3 lawsuit Webb Candy as Webb Candy has the right to recover a
4 penny from you. Webb Candy doesn't have any contract with
5 any Wal-Mart. Where did Webb Candy sign a contract with a
6 Wal-Mart store?

7 MR. SNYDER: It didn't.

8 THE COURT: It didn't.

9 MR. SNYDER: Right.

10 THE COURT: I don't think Webb Candy has any
11 rights in this lawsuit whatsoever.

12 MR. SNYDER: That's true.

13 THE COURT: And you argue that in your brief with
14 respect to Little i, and I agree with you. What are they
15 doing here asking for money that you owe Little i? If you
16 owe anybody, you owe Little i.

17 So, for one thing, I don't understand why you
18 haven't moved to dismiss Webb Candy. I don't know why they
19 would have any rights here whatsoever. And, in fact, they
20 are in a bit of a bind because if their argument is that we
21 have a contractual relationship with these Wal-Mart stores,
22 then they were inducing the stores to contract with someone
23 the stores didn't think --

24 MR. SNYDER: They have a quantum meruit claim in
25 this case. They are saying even though we're not parties to

1 these contracts, these contracts are invalid, we were
2 entitled to the benefit of it. So they're arguing that.

3 THE COURT: Not against the Wal-Mart store.

4 If my buddy makes a contract with Wal-Mart and he
5 agrees to sell 1,000 widgets to Wal-Mart and then he comes
6 over to me and says would you please send 1,000 there and I
7 will pay you for them and I send the 1,000 and he doesn't
8 pay me, I don't think I have any rights against Wal-Mart. I
9 have rights against him, not against Wal-Mart.

10 MR. SNYDER: But there is no contract with LSM. I
11 mean, there is a contractual agreement. There is an offer
12 and acceptance. The offer is made by Webb Candy. The store
13 --

14 THE COURT: Acting on behalf of LSM. Webb Candy
15 who says I'm calling you, I'm with LSM, who negotiates this
16 deal purporting to represent LSM, who when the deal is
17 closed sends an invoice from LSM, payment being made -- how
18 does a contract with Webb Candy get formed under those
19 rights?

20 MR. SNYDER: I don't think it does.

21 THE COURT: I don't think it does either.

22 MR. SNYDER: There is a contract with LSM that's
23 voidable because what was told about that contract is a
24 misrepresentation because LSM is not the entity making these
25 sales. It's somebody else. It's the identity problem.

1 It's the restatements example where someone goes to the bank
2 and says I'm Mr. Jones, a millionaire, I want a loan and
3 they give him a loan. Those parties have a contract. But
4 it's voidable because it's in the wrong name. He isn't
5 Mr. Jones. He is somebody else. So the bank can honor that
6 contract with Mr. Smith or whoever it is.

7 THE COURT: I don't think that's what happened. I
8 mean, it's a case that just makes my head spin.

9 You know, at one level what we have here is an
10 accusation that Webb Candy employees called Wal-Mart
11 managers and implied they were with LSM, induced Wal-Mart
12 managers to make a contract with LSM for lip balms. The lip
13 balms were then delivered. They were precisely the product
14 ordered except for the fact that they, LSM -- which I think
15 has the contract, the contractual responsibility -- LSM got
16 them from Webb Candy essentially or told Webb Candy to do
17 the delivering. Wal-Mart then sells these things. You
18 might not agree with the exact amount, but it sounds like
19 Wal-Mart made a ton of money off of the ones that they sold.
20 I mean, they sold millions of these units and made a 50
21 percent mark-up. So now Wal-Mart, having made a million
22 dollars as a victim of fraud, based upon -- I mean, we don't
23 have many cases where people who profit -- victims of fraud
24 profited to the tune of a million dollars and are seeking
25 legal remedies. So I'm having --

1 MR. SNYDER: We're seeking equitable remedy.

2 We're seeking to void these contracts.

3 THE COURT: No, you are seeking to void part of
4 the contract. You want to keep the million dollars in
5 profit you made off of half of the contract. I mean, this
6 fight is -- on the other hand, we have Webb Candy, whose
7 employees called and lied through their teeth and who
8 profited even if we today burn all these remaining lip balms
9 and everybody goes their own way. So basically this whole
10 lawsuit is about how much more you are going to profit or
11 they are going to profit from the deal. Right now, as
12 things stand here, you both made money off this deal. We're
13 in here having a fight in federal court about who is going
14 to profit more essentially or not have more profit.

15 So the fraud here again, to get back to the fraud,
16 is by saying they were with LSM they induced a store manager
17 to make a contract with what he thought was LSM, which I
18 think he did. He did make a contract with LSM. LSM had the
19 contractual responsibilities.

20 Now, it could be the second layer you are talking
21 about is really the fraud -- although, it's not the focus of
22 your brief -- which is the store manager not only was
23 induced into thinking he was making a contract with LSM,
24 which he was, but he was induced into thinking he was buying
25 an approved product, which he wasn't. But that really isn't

1 the focus of your briefing. The focus of your briefing was
2 on the identity of the vendor.

3 MR. SNYDER: Again, I mean, they are one in the
4 same thing. You present yourself as an authorized supplier
5 and you are an authorized supplier of unauthorized product.

6 THE COURT: You argue in your briefs, for example,
7 lack of conformity. You don't argue that the reason they
8 didn't conform is because the product wasn't approved. You
9 argue that the reason it didn't conform was because it
10 wasn't the right person selling it to you.

11 MR. SNYDER: That's right. That's right. This is
12 the entity that Wal-Mart has rejected. We're not going to
13 do business with you. But now we're being forced to do
14 business with them.

15 THE COURT: But you are not doing business with
16 them. I'm trying to explore -- I'm not being rhetorical
17 here. It's a very hard case, for me at least, to figure
18 out.

19 You didn't do business with them. You did
20 business with LSM. Your contract is with LSM, it seems to
21 me. LSM basically used Webb Candy to fulfill LSM's
22 contractual obligations, and LSM then passed on the bulk of
23 the money it got.

24 MR. SNYDER: It's not LSM's product. It's not LSM
25 calling up the stores saying we have this product. It's

1 Webb Candy. And it's not the party who we think we're
2 entering into contracts with that we're actually entering
3 into contracts with. The party that's fulfilling this
4 contract is not the party who we think is going to be
5 fulfilling this contract, and that's it. We're entitled to
6 do business with who we want to do business with.

7 THE COURT: I agree. But the problem is you did
8 do business with who you thought you were doing business
9 with because the contract if it exists, I think, is between
10 you and LSM. That's who you thought you were doing business
11 with. That's who you ended up doing business with.

12 MR. SNYDER: That's what the invoices say.

13 THE COURT: That's what the invoices say.

14 Let's say if you hadn't gotten all the lip balms
15 you were supposed to get and you wanted to get the lip balms
16 and they weren't delivered, I assume you would have to sue
17 LSM for the lip balms, not Webb Candy. So that's the odd
18 thing about it.

19 The argument I'm making with you is not an
20 argument that Webb Candy made in its briefs either. We are
21 stuck here with you making one set of arguments, them making
22 another set of arguments, and me thinking a third way about
23 the case. I don't quite know what to do about it.

24 All right. Let me ask you about a couple other
25 issues. Webb Candy talks about its relationship with LSM

1 differently than with Little i. With Little i they seem to
2 concede that they were -- basically Little i, they just
3 rented the vendor number or paid for use of the vendor
4 number. But they keep talking about how they were in a
5 joint venture with LSM. Part of the deal was they would
6 also try to market LSM products at the same time they were
7 marketing Webb Candy products. What does the record show
8 about that? Did they in fact push LSM products when they
9 were making these calls? Were there LSM products that were
10 delivered as part of these contacts between Webb Candy and
11 Wal-Mart stores?

12 MR. SNYDER: No. LSM had some products. None of
13 them were sold to Wal-Mart stores. The license, I think,
14 expired in the end of December of 2008. It was a very short
15 window left of time to sell these things. Licensed Sports
16 Marketing had given up on selling them. That part is not --
17 that aspect of their relationship is not significant. They
18 never attempted to --

19 THE COURT: Is there evidence that they set out in
20 a different way than they set out with Little i; in other
21 words, that the discussions and negotiations resulted in a
22 different sort of plan, even if it didn't come to fruition
23 with LSM, than the plan with Little i?

24 MR. SNYDER: You know, the story that's being told
25 about LSM is really not what's accurate. I mean, this idea

1 is that -- with the story they are telling is, well, we had
2 this deal with Little i and then we switch over to LSM.
3 Well, actually, they were using LSM's number from day one.
4 So they were kind of jointly making -- I have a timeline
5 that I brought, if I could maybe kind of go through that.

6 THE COURT: Sure, if you have got one. I made my
7 own based on the briefs, but I will take any help I can
8 gather with figuring out the facts.

9 Here, I'm confused about this and I don't remember
10 reading this in the briefs. So they were marketing under
11 LSM's number at the same time they were marketing under
12 Little i's number?

13 MR. SNYDER: Yeah. I think even in the complaint
14 it talks about that. But, yeah, the very first
15 transaction -- and I put the invoice, the second one, behind
16 the timeline.

17 THE COURT: Well, what about the representation --
18 I don't remember -- I guess it was in Webb Candy's brief
19 where they said, I think it was, November 26th, or something
20 like that, they terminated the relationship with Little i
21 and they began their relationship with LSM. So that's just
22 not true? They were using LSM's number long before -- not
23 long -- nothing here happened long before anything else, but
24 -- yeah, in the brief Webb Candy says they terminated their
25 agreement with Little i and they entered into a similar

1 agreement with LSM on November 25th, 2008. You are saying
2 that two months earlier they were already using the LSM
3 number?

4 MR. SNYDER: Right. There was a written agreement
5 dated November 25th. I think that's in the record. It
6 confirmed this agreement. But the agreement itself goes
7 back to when they first started. The order date on the
8 first Licensed Sports Marketing invoice is September 29th of
9 2008. I have a red rope of other sales in LSM's name made
10 during October and November and really up until January
11 15th. I put that as an attachment to the timeline as well.
12 That was the last sale.

13 THE COURT: During this time when you have both
14 the green bar and the yellow bar, this period of time when
15 they are both there, why would they -- if they are paying
16 Little i five percent and LSM three percent, why would they
17 make any sales under Little i's number?

18 MR. SNYDER: I don't know. You would have to ask
19 Mr. Moore that.

20 THE COURT: If they are both dealing with -- if
21 they have permission to use both the Little i number and the
22 LSM number during this period of time, who were the
23 employees when they would call saying they were with them?

24 MR. SNYDER: Well, whoever's name is on the
25 invoice is who.

1 THE COURT: But the invoice follows the call.

2 MR. SNYDER: Right.

3 THE COURT: When I pick up the phone and I call,
4 do I say I'm with Little i? If it's October 3rd of 2008
5 when a Webb Candy employee would pick up the phone and call
6 a Wal-Mart manager, would she say I'm with Little i or would
7 she say I'm with LSM?

8 MR. SNYDER: Richard Twistol has that in his
9 deposition. He is one of the salespeople. He said whatever
10 name was on the invoice that ultimately got sent is the same
11 name that I used when I called.

12 THE COURT: Oh, I see. But how would he choose
13 which name? So he is sitting there at his desk and he is
14 calling the Wal-Mart in wherever, Poughkeepsie, how could he
15 decide which name to use on the phone?

16 MR. SNYDER: I don't know.

17 THE COURT: That doesn't come up in the
18 depositions?

19 MR. SNYDER: No -- well, in the depositions they
20 said, yeah, we originally started -- I mean, they -- this is
21 what the record shows is kind of what their story is, which
22 is that we started out as Little i and then at some point
23 there was a switch over to LSM and so --

24 THE COURT: But you say there wasn't any such --
25 that didn't happen. You have got them making sales under

1 both names basically from the same date.

2 MR. SNYDER: That's right. The story they told is
3 what's in the record, and that's not reflective of what the
4 records actually say.

5 THE COURT: Okay. That's something else I didn't
6 really understand from the briefs. I thought this was
7 sequential.

8 MR. SNYDER: In fairness, Your Honor, these
9 invoices have not been submitted to the Court. You know, I
10 have them through discovery, but they haven't really
11 identified which of these invoices they are even saying are
12 unpaid at this point in time to us.

13 But the reason I think that I wanted to do this in
14 a timeline is that, you know, they raise so much in their
15 brief about, well, you knew all along and that's just not
16 the case. They point to this November 4th e-mail.

17 THE COURT: Let me get to that just in a second.
18 They have the 11 points that they say, 11 points of
19 knowledge or whatever they would be, that I want to run you
20 through.

21 Before we get to that, let me -- for you to be
22 able to void the contract, there needs to be a
23 misrepresentation. We have talked about whether there was a
24 misrepresentation.

25 Do you agree that under the law any

1 misrepresentation would have to be material?

2 MR. SNYDER: Material or fraudulent, yes.

3 THE COURT: It has to be material. Yeah, in fact,
4 it's the "or" -- it could be either or. It could be
5 fraudulent. But a fraudulent misrepresentation would have
6 to be material, I would think. If you were lying about
7 something that didn't matter to Wal-Mart, they didn't care
8 about, it wouldn't -- if you said your name was Kerry and
9 you said it was spelled with a K when in fact it was spelled
10 with a C, it would not allow Wal-Mart to void the contract?
11 Even though it was fraudulent, it wouldn't be material,
12 right?

13 MR. SNYDER: I can't argue with that.

14 THE COURT: All right. And your material
15 argument, again, is that it matters a lot to Wal-Mart --
16 well, I don't want to take us through this again.

17 Let's talk about the justifiable reliance point.
18 And it's a little hard for me to follow the legal category
19 into which Webb Candy is putting this when they talk about
20 you knew you were dealing with Webb Candy. I don't know if
21 that means that you were defrauded because if you look at
22 the communications as a whole they weren't fraudulent or if
23 it means even if they were fraudulent, your reliance wasn't
24 justifiable because you had enough knowledge of what was
25 going on. I'm not quite sure what legal category this fits

1 in.

2 But let me just take you quickly through these 11
3 points. Some of them I agree with you and we don't have to
4 say a lot about.

5 Point one was Alan Webb told Luke, the manager of
6 the Apple Valley store, that Webb Candy wanted to sell to
7 Wal-Mart. Now, that's one guy at one store so it doesn't
8 mean anything to me, so I agree.

9 MR. SNYDER: That claim is not in the case.

10 THE COURT: Right. That has nothing to do with
11 anything.

12 Secondly, Twistol -- and I'm just taking this out
13 of Webb Candy's brief -- Twistol testified that he initially
14 introduced himself as being with Webb. Now, he is talking
15 about when he went out to talk to Luke?

16 MR. SNYDER: Yes.

17 THE COURT: This isn't that he was introducing
18 himself as being with Webb when he was calling?

19 MR. SNYDER: No, he is talking about a meeting
20 with Luke.

21 THE COURT: Okay. So that's also an Apple Valley
22 specific issue.

23 Third, Alan Webb had Luke review the invoice with
24 Little i's name before Webb Candy started selling to
25 Wal-Mart stores. And, again, this is Apple Valley, not

1 Wal-Mart generally. And, as you pointed out, this is, of
2 course, after they have already made deals to use at least
3 Little i's number.

4 Do we know when they made the deal to use LSM's
5 number or do we just know when the first invoice went out
6 under LSM's number?

7 MR. SNYDER: Well, the testimony from the owner
8 of -- or former owner of Licensed Sports Marketing was that
9 it was in late October or early November that they came up
10 with the agreement and then reduced it to writing and on
11 November 25th --

12 THE COURT: Well, you have a September 19th
13 invoice going out with LSM's number.

14 MR. SNYDER: Yeah, September 29th. Yes. And a
15 whole bunch of others in October and November.

16 THE COURT: Well, if they didn't reach this
17 agreement until October, how could they be using LSM's
18 number before that?

19 MR. SNYDER: I believe they must have had an
20 agreement earlier than what they say.

21 THE COURT: Oh, you think that the LSM owner was
22 either mistaken or was not being truthful about the timing?

23 MR. SNYDER: Yes. I mean, it would have to be
24 because they had his number. When they used the number
25 right away at the end of September, they were, obviously,

1 having his number. The only way they can get that -- it's
2 not a number that everyone knows, only the owner knows.

3 THE COURT: Let me just ask you, you have
4 submitted here an invoice from September 26th using the LSM
5 number. Do they continue steadily then after September
6 26th? There isn't, like, one invoice and then none for a
7 month and then another invoice?

8 MR. SNYDER: They continued steadily.

9 THE COURT: Okay. So this isn't a mistake or an
10 outlier, this one invoice from September 26th? It's the
11 start of a steady drip, drip, drip, drip of LSM deals?

12 MR. SNYDER: That's correct. And I brought them
13 with me in case there is any disagreement about that, but
14 that's true.

15 THE COURT: Webb Candy talks about sort of the
16 pervasiveness of the Webb name, that the lip balms were
17 labeled distributed by Webb Candy; the UPC code if you
18 scanned it, it would come up, I assume on the cash register,
19 Webb business promotions; that the displays had Webb Candy's
20 name and telephone number; that some stores would reorder
21 directly from Webb Candy; that when you called the telephone
22 number, it was answered Webb Candy. Now, I recognize one
23 point is, of course, that none of this happens unless the
24 stuff is in your store, which means you've already been
25 duped into buying it or you have already decided to buy it.

1 So none of this would explain why the manager wasn't fooled
2 initially when he bought it.

3 But what is your response to Webb Candy's argument
4 that at least once the stuff is there in the store Webb
5 Candy's name is all over this thing and so the notion that
6 we're shocked to find out that we're dealing with Webb Candy
7 is not credible given that Webb Candy's name is everywhere
8 you look once the stuff is in the store?

9 MR. SNYDER: Well, the legal context in which they
10 are raising this is not exactly clear to me. I think they
11 are raising it and you are not justified on relying on what
12 we tell you because you know the truth. Now, that all --
13 you are right, it all happens after this contract is formed,
14 so I don't think it really applies to that. But the
15 standard under justifiable reliance is actual knowledge of
16 the fraud, not should have known. I don't think that they
17 are saying that any of the store managers ran down when this
18 stuff arrived, picked up the thing and read the fine print
19 on the label that says distributed by Webb Candy. I'm not
20 sure what that even -- even if he had, I'm not sure what
21 that would say, other than maybe Webb Candy is somewhere in
22 this chain of distribution as well. So I don't think that
23 the fine print items really affect justifiable reliance at
24 all because it's not actual knowledge and there is no
25 evidence of actual knowledge.

1 THE COURT: I know you cited to me from the
2 restatement. You cited an example given in the restatement
3 that a negligent failure to discover the truth, it's not
4 making reliance unjustifiable. I just didn't have time to
5 research this myself. How do you distinguish justifiable
6 reliance from unjustifiable reliance? What's unjustifiable
7 reliance if it's not negligent?

8 MR. SNYDER: Well, if you actually know. If you
9 know at the time. You can't say that -- if they had said to
10 a store manager, well, we're really using someone else's
11 number - wink wink - and then the bill shows up or the
12 invoice shows up or the invoice shows up --

13 THE COURT: Then you wouldn't even have a -- but
14 if you actually --

15 MR. SNYDER: It's still false. It's still a false
16 representation. So it still meets the requirement that it
17 is a false representation. It meets the requirement.
18 Whether you know about it or not doesn't make it false or
19 unfalse. The question is, well, are you justified in
20 relying on this when you know it's false.

21 THE COURT: Not only actual knowledge of this
22 misrepresentation that makes the reliance unjustifiable?

23 MR. SNYDER: Yeah. The restatement is very clear
24 on that. We cited some Minnesota case where someone didn't
25 read the contract and when they did -- when they did get

1 actual knowledge, now they have the basis to rescind the
2 contract.

3 So this stuff about a manager knowing, there is no
4 evidence of actual knowledge. I mean, they are trying to --
5 they are basically saying you should have known from looking
6 at this. You should have gone down and looked at this thing
7 when it came in or the manager should have reviewed -- I
8 don't know if the manager reviewed any of this stuff. The
9 bill comes in. There is a clerk that handles that.

10 THE COURT: Right. One of the things they raise
11 is that there is a line, apparently, in the invoice -- even
12 though they go out on the LSM name or the Little i name --
13 that says that Webb Candy accepts Visa and Mastercard. I
14 assume that managers aren't cutting the checks on these. I
15 assume the invoices go to a bookkeeper in the back who cuts
16 the checks.

17 MR. SNYDER: That's right. And I don't know that
18 that knowledge of a bookkeeper is going to be all that
19 significant, even if they read that far. Again, what does
20 it really say? The invoice says Licensed Sports Marketing.
21 So Webb Candy takes Visa, what does that tell anybody?

22 THE COURT: It would be confusing, if nothing
23 else. I guess if I was a bookkeeper, I might think that LSM
24 copied this invoice from somewhere and forgot to take out
25 Webb Candy's name. But it would be ambiguous at best.

1 MR. SNYDER: Plus that undercuts the argument that
2 we're doing business with LSM. I mean, it's pretty clearly
3 that this is coming from Webb Candy, and Webb Candy is going
4 to be ultimately receiving the payment on this.

5 THE COURT: But most of the invoices -- I mean, if
6 you look at an invoice, you would think you were being
7 invoiced by LSM. You wouldn't think you were being invoiced
8 by -- in fact, your fraud claim depends in part upon the
9 fact the invoice coming from LSM is leading them to believe
10 that LSM is actually doing it.

11 MR. SNYDER: If it said Webb Candy on it, we
12 couldn't pay them. It wouldn't be able to be paid.

13 THE COURT: Let me ask you about this November
14 4th, 2008 e-mail from Alan Webb to Seth Malley.

15 I certainly agree with you that the notion that
16 this e-mail tells Malley "exactly what it was doing" is
17 ridiculous. It doesn't tell Malley exactly what they were
18 doing. Exactly what it's doing is we're selling and we're
19 paying so and so to use their number, and it doesn't say
20 that.

21 At the summary judgment stage, I have to take all
22 inferences in favor of the non-moving party, and I have to
23 look at how a jury could read this, even if this isn't the
24 way I would read this. Is there not enough in here that a
25 jury could think that, at a minimum, Webb is telling Malley

1 that Webb Candy is selling its products essentially to
2 Wal-Mart stores, putting a million of its products in
3 Wal-Mart stores?

4 MR. SNYDER: That question is what prompted me to
5 try to put this onto a timeline to explain it, because at
6 the time that that e-mail is issued, there is no more sales
7 going on to Little i. Those are in the past. So this does
8 not provide notice to Wal-Mart that Little i -- or someone
9 is using Little i's name and number on sales. Those have
10 happened in the past.

11 The contracts that they are really going to be
12 trying to get the jury to enforce in this case are going to
13 be all Licensed Sports Marketing, I believe. It's not
14 exactly clear which ones they have now taken off of their
15 list, but I believe that they are going to be all Licensed
16 Sports Marketing invoices.

17 THE COURT: So there may be a stray contract here
18 or two, but your belief is that essentially Wal-Mart has
19 basically paid for -- all the Little i invoices have been
20 paid?

21 MR. SNYDER: I believe that's the case, Your
22 Honor. Now, they have said that they haven't been paid, but
23 that was, apparently, based on the fact that they didn't get
24 paid by their partner here. So it's the Licensed Sports
25 Marketing sales that are going to be going to a jury. The

1 e-mail doesn't say anything about Licensed Sports Marketing,
2 the sales that have been going on, by that point, for over a
3 month and continued until January 15th, which is the last
4 order date that we have on any invoices. And, you know,
5 it's five days later they tell us about Licensed Sports
6 Marketing. Well, we have been selling. All throughout this
7 period of time, you know, in November and December there is
8 some investigation going on about some of these Little i
9 sales and they're not telling us. That's the tip of the
10 iceberg. We're really selling under Licensed Sports
11 Marketing, they never say that. So they are continuing to
12 conceal this throughout this whole process.

13 THE COURT: Okay. They say in their briefs at a
14 couple of points that -- at one point I wrote it down in my
15 notes, "Alan Webb notified Wal-Mart that it was working with
16 LSM." Your position is that was on January 20th of 2009.
17 And you had no hint of any involvement with LSM before that?

18 MR. SNYDER: Yeah. That's the record citation
19 that they provide. If you look at what they cite as support
20 for that statement, it's January 20 th, 2009.

21 THE COURT: And they also say, "Larry Wilhelm, the
22 former owner of LSM, also notified Wal-Mart that it was
23 working with Webb Candy." Your view is that, to the
24 contrary, he testified he never mentioned Webb Candy to
25 Wal-Mart, all he did was set up this -- it's referred to as

1 a lockbox. I take it he set up an account at a bank and he
2 told Wal-Mart to direct deposit his checks to that?

3 MR. SNYDER: Instead of sending it to our home
4 office, please send our checks to a lockbox, which is
5 something that happens --

6 THE COURT: The words "Webb Candy" never came up
7 in connection with any of that?

8 MR. SNYDER: No. No.

9 THE COURT: I just wanted to verify that.

10 On the ratification argument that Webb Candy
11 makes, they cite Minnesota authority that I have run across
12 before that talks about that if you accept and retain the
13 benefits of a fraudulently-induced contract that you ratify
14 it. And this is this head scratcher I have in this case
15 where we typically don't have fraud victims who profited
16 from being defrauded.

17 How do you get both to keep the profits and void
18 the contracts?

19 MR. SNYDER: I don't know any reason we would have
20 to pay the profits back to them. They are not entitled --

21 THE COURT: It seems outrageous that they would
22 get it, too.

23 Did you run across in your research any situations
24 like this where we have a victim of fraud who was not
25 financially hurt in the slightest by being defrauded, who in

1 fact profited off the fraudulently-induced contract, who was
2 seeking to keep the profits they have earned off the
3 fraudulently-induced contract and then basically return, for
4 example, unsold merchandise? Anything even close to our
5 situation?

6 MR. SNYDER: I don't think there is anything I
7 have seen that is really on point. I mean, there is a lot
8 of law in the real estate area where someone has been living
9 on the land and maybe profiting from their use of the land
10 and then realizes that I have been --

11 THE COURT: You cited to me like the tenant who
12 plants the crop. But this is different, though, in that
13 this is a fraudulent inducement of contract claim. I mean,
14 you got sued. You are not suing. I understand that.
15 Essentially your defense is this contract is voidable
16 because we were fraudulently induced to enter in this
17 contract. Now, we made a million bucks off the contract.
18 We're going to keep that.

19 MR. SNYDER: It's not one contract. It's 900
20 contracts.

21 THE COURT: Right. But just for ease of -- it's
22 hundreds of contracts, I understand that. But, you know,
23 we, as Wal-Mart, made a lot of money off of these
24 fraudulently-induced contracts or we made money off of some
25 of them, but now we want to void others of them. It comes

1 in both ratification where you want to keep the money you
2 made off of some of the fraudulently-induced contracts and
3 it comes up in recission.

4 Recission almost always is when you have a victim
5 of fraud they have been hurt. And what we use recission to
6 do is to get them back where they were before they were
7 hurt.

8 MR. SNYDER: Well, that's often the case, but it's
9 not always the case. We cited the case -- actually, the
10 other side cited the case where the party actually did
11 better, *Kirby v. Dean*. And they went to buy some insurance
12 policies and they were told that these policies will have a
13 certain value at year 15 and that was not the case. They
14 actually were going to have a better value than that. But
15 it was a fraudulent statement and provided a basis to
16 rescind even though they hadn't been damaged. So there is
17 no requirement of damage to rescind the contract. If it's
18 not --

19 THE COURT: Yeah, but by rescinding the contract
20 they put the "victim" back to where he or she was before
21 they were fraudulently induced to buy this insurance.

22 MR. SNYDER: Well, like in the life insurance
23 example, you get a year into it and now you are going to
24 rescind where you have had a benefit of a year worth of
25 coverage and there is a cost of insurance. I mean, you have

1 to provide that back as part of the restitution.

2 THE COURT: You didn't die during the year, so it
3 was no --

4 MR. SNYDER: Right, but there is some value to
5 being insured. So if you are going to rescind, you are
6 going to have to pay the premiums that were due during that
7 period of time, for example. And the insurance company is
8 going to keep those because it did provide insurance for a
9 particular period of time.

10 So the idea is to put the parties back in the
11 position that they would have been in before the contracts
12 got entered. That doesn't require anything to do with
13 profits at all. What it requires is that you give them back
14 what you got, which is what we're trying to do with these
15 returns we want to give them. We have already returned
16 some. We want to return a whole bunch more as soon as they
17 accept to take it or accept it. And we also then -- for the
18 things that we can't return to them, we would have to give
19 them some value for that. And the value of that is the
20 contract price for it. So what we can't give back to them
21 -- we have to put them in the same position that they would
22 have been in. And that gets accomplished here through the
23 recission. They get to keep all the money. If we had
24 overpaid, we could try to get that back. We could try to
25 get it back in any event, I think. But they are back in the

1 same position that they would have been in had there been no
2 contract. So they are not out of pocket anything at the end
3 of this if we void these contracts.

4 Yes, Wal-Mart has some money in its pocket because
5 of this, but that doesn't affect the right of rescission.
6 I'm not aware of any cases that say it would.

7 THE COURT: What about the ratification cases, the
8 ones that hold that when you accept and retain the benefits
9 from a contract, you can't void the contract? Haven't you
10 accepted and retained the benefits from this
11 fraudulently-induced contract?

12 MR. SNYDER: Have we accepted -- I mean, the cases
13 that they cite are --

14 THE COURT: I don't know how you say it, *Proulx*
15 cases. There is one that always gets cited.

16 MR. SNYDER: Five-year gas station lease, a year
17 into it you find out you have been defrauded, you keep it in
18 place another year and get paid a salary by the oil company
19 during that period of time. That's the case that they are
20 relying on. It's nothing like what we have here. That
21 person made a conscious decision that, oh, I want to keep
22 going with it. Even though I know that this contract is not
23 what it was represented to be, I'm going to keep going with
24 it. I don't think we have that.

25 THE COURT: Is there even a part of this case,

1 though, that's a little bit like that *Proulx* case? Like,
2 for example, you say that you find out about the LSM fraud
3 on January 20th. It isn't until February, I forget the
4 date, 9th, something like that, that notification goes out
5 to the stores. And even then the notification is you can
6 keep selling this stuff if you want or if you wish, you can
7 return it. Isn't that a lot like the *Proulx* case where you
8 are continuing to take the benefits of what you have -- you
9 have Wal-Mart corporate now indisputably realizing the fraud
10 and it doesn't issue a pull order on January 21st. When it
11 gets around to talking to the stores -- and I realize you
12 have to have some time to think, but when it does contact
13 the stores in early February, it isn't pull the stuff. It
14 isn't return the stuff. It's up to you, you can keep
15 selling it or you can pull it or you can return it.

16 MR. SNYDER: At that time, that was the message.
17 And in response to that over \$300,000 of product was
18 returned. That process got cut off when they said we're not
19 going to take these returns anymore.

20 THE COURT: Let's think of these as individual
21 contracts. If some store in wherever, in Indiana, got that
22 message from Mr. Malley and said these things are moving
23 pretty well, we will keep selling them and next week they
24 keep selling lip balms, isn't that exactly the *Proulx* case?
25 Isn't that ratification?

1 MR. SNYDER: Well, I don't know that we have
2 evidence that that's what happened. We had a return process
3 going on that was ended by Webb Candy. So I don't know if
4 that Indiana store --

5 THE COURT: Well, you're saying we don't think
6 that a single lip balm was sold after February 9th by any
7 store?

8 MR. SNYDER: Oh, I'm sure it probably was.

9 THE COURT: And wouldn't those sales be accepting
10 the benefits of fraudulent contracts?

11 MR. SNYDER: Then if they hadn't returned it by
12 that point in time for an individual lip balm, that's true;
13 not for the whole lot. I mean, at some point we're
14 returning that whole lot. And in March we're telling the
15 stores to pull that whole lot.

16 THE COURT: Is it fair to assume just from roughly
17 speaking that e-mail -- did I get the date right or am I
18 close on the date? February 9th, yeah. So February 9th
19 this message goes out from Malley. He tells the stores to
20 return by the 28th.

21 When does Webb Candy say they are not taking back
22 their stuff anymore? What's the date of that?

23 MR. SNYDER: The 24th.

24 THE COURT: The 24th. So is it fair to assume
25 then that about 300 and some thousand dollars of stuff was

1 sent back to them between February 9th and February 24th or
2 so and that another \$300,000 was -- do we know of -- I'm
3 asking this very badly. I'm sorry.

4 I'm trying to figure out do we know roughly how
5 much store managers were happy to keep on their shelves and
6 did keep on their shelves until the pull order came in March
7 versus material that you did want to send back to Webb Candy
8 but you couldn't because they refused to take it? In other
9 words, of the 300 and whatever thousand is sitting in your
10 warehouse, how much of that is stuff in your warehouse
11 because you pulled it in March versus stuff that, say, on
12 February 25th was attempted to be returned and rejected? Do
13 you have any sense of that?

14 MR. SNYDER: No, I don't, Your Honor. The time
15 period isn't that long really. The 24th they sent this --
16 there was a little tiff going on between someone at Wal-Mart
17 and Mr. Webb, and Kim Carter at Wal-Mart was saying you need
18 to be more proactive in getting this stuff out of the
19 stores. You sold this stuff to them. You contact them,
20 make sure it comes back. He said I don't have time to do
21 that.

22 THE COURT: Webb Candy says that conversation
23 doesn't occur until March.

24 MR. SNYDER: No, that conversation was in February
25 -- well, the conversation was earlier, but the e-mail chain

1 is --

2 THE COURT: I could be getting this wrong, but my
3 recollection was in the reply brief they say -- that Webb
4 said that conversation occurred in person at a meeting that
5 took place in March, so that he denies that Carter told him
6 he needs to clear the stuff out of there before March.

7 MR. SNYDER: Document 36-24 is the e-mail that I
8 am referring to that discusses that.

9 THE COURT: What's the date of the e-mail?

10 MR. SNYDER: The 24th of February.

11 THE COURT: 24th of February, okay.

12 MR. SNYDER: Yep. And earlier there is testimony
13 from her that when they are -- back through November that
14 they had a conversation when they were talking about --
15 November or December, I should say, when they were talking
16 about the Little i situation and she told him you can't sell
17 products to a store using someone else's number. And that's
18 in the record back then.

19 THE COURT: There is this quote from her that gets
20 cited a lot in the briefs about telling Mr. Webb to get his
21 stuff out of the stores. When does she say she told him to
22 get his stuff out of the stores?

23 MR. SNYDER: I think she was talking to him about
24 those sorts of things throughout the process. I don't think
25 she pinned it down to a particular date.

1 THE COURT: There is a difference in saying you
2 can't do this and saying now you go back to the stores you
3 did this in and get your stuff out of there. Does she in
4 her testimony distinguish between the two?

5 MR. SNYDER: No. I think this is really coming up
6 after January 20th, if I can put those sort of time brackets
7 around it. That's when they provided the UPC numbers and
8 Seth Malley said now we have understood, now we can look at
9 some records and figure out what it is that has gone through
10 the Wal-Mart system and see how many stores have actually
11 been sold to. That's when they come up to this huge number
12 of stores that have been sold to. They didn't understand
13 that before. You know, that's when the matter really became
14 more serious, and these ongoing discussions and Mr. Webb is
15 saying, well, don't kill my business. Seth Malley is
16 saying, well, I've got to --

17 THE COURT: I realize that, at least according to
18 his testimony, this message that goes out on February 9th,
19 which kind of gives stores the option to return it, he is
20 trying to be nice to Mr. Webb. Sometimes it doesn't pay to
21 be nice. This is something that is going to hurt you in
22 this lawsuit or could hurt you in this lawsuit. So I
23 understand, though, he had good motives in what he did.
24 That point is clear.

25 MR. SNYDER: The end point, we're in March, and

1 they have had a meeting now and everything is crystal clear.
2 They are not going to accept anything further, and we're
3 pulling everything off the shelves and shipping it to a
4 distribution center.

5 THE COURT: Let me just ask you one question about
6 the perfect tender rule and that's that the goods -- one of
7 the requirements is that the goods didn't conform. You say
8 that the reason they didn't conform is because they were
9 supposed to be coming from LSM and they were coming from
10 Webb Candy. And I don't remember if you just cited a case
11 that hits this right on point. I just want to make sure if
12 you are aware of law that says this directly on point, which
13 is for purposes of this provision of the UCC 2-601 that if I
14 order goods and the goods I get -- the lip balm I get is
15 precisely the lip balm I ordered in all respects except that
16 it was really being supplied by X when I thought it was
17 going to be supplied by Y, that that is a non-conforming
18 good for purposes of 2-601. Are there cases directly on
19 point that say that?

20 MR. SNYDER: For the rejection issue? Because it
21 is for revocation, I think, for sure. I think maybe there
22 is a --

23 THE COURT: Well, I mean for -- well, we're going
24 to get to the -- there is a similar issue that comes up
25 under the revocation of -- where the phrase is different.

1 Let me just find it. It's non-conforming in a way that
2 costs you money. The value is substantially impaired. And
3 I know you cited cases there about your faith being shaken
4 because you found out the seller isn't who you thought.

5 But under the perfect tender rule are you aware of
6 cases that says that, for example, lip balm that is
7 precisely the lip balm that you thought you were buying that
8 it doesn't "conform to the contract" just because it wasn't
9 supplied by the person you thought who was supplying it?

10 MR. SNYDER: I don't think I cited a case that
11 deals with that specific issue. It's material, and we cited
12 cases that --

13 THE COURT: Right, you cited materiality cases.

14 MR. SNYDER: Right.

15 THE COURT: The same point now on 2-608, which is
16 the revocation of acceptance. Without reading any of the
17 cases -- when I read that the value of the product has to
18 have been substantially impaired, I would think that this
19 kind of situation wouldn't fit because the lip balms aren't
20 worth any less. The value of the product isn't
21 substantially impaired. The lip balms weren't worth any
22 less because they were sent by Webb Candy rather than LSM.
23 You cite cases using phrases like it shakes the buyer's
24 faith and the integrity of the product, faith is shaken in a
25 major investment, buyer becomes fraught with apprehension.

1 It seems almost a little silly to be using those terms when
2 we're talking about a supplier of lip balm, a supplier of
3 lip balm to a multi-billion dollar company.

4 Is there any sense in those cases that -- I don't
5 know quite how to ask this. Do the cases say that a mistake
6 as to the identity of the buyer automatically impairs the
7 value of the goods or it could impair the value of the goods
8 and that's something that a jury would generally decide?

9 MR. SNYDER: I think it could vary. It's not
10 simply, you know, the product -- well, in certain
11 circumstances you could have a commodity that is a commodity
12 that's the same no matter who supplies it, corn or something
13 like that. And it doesn't matter if someone says I'm Acme
14 Corn Company and they are not. It's not going to probably
15 be that significant. It probably is not a basis to reject
16 it if the corn itself is okay.

17 But these products have with them other
18 components, not just the product. It's product liability
19 insurance, the testing of the product, the financial
20 wherewithal of the supplier, whether they are violating
21 someone else's trademark rights. All these things are kind
22 of pulled together into the product that's being sold and
23 that's the stuff. It's probably not so much the defect with
24 the lip balm itself. All those other things are missing
25 here. That's what's shaking the faith under this objective

1 standard, that we just don't know -- we have rejected this
2 company before and now they are lying to us. Why would we
3 want to do business? Why is that not an important
4 consideration in considering whether we want to void our
5 acceptance of the goods?

6 THE COURT: I mean, just the conceptual problem
7 I'm having with that argument is that it seems to me at the
8 end of the day you ended up with a contract with LSM that
9 had the obligation to have the product-liability insurance
10 and all those sorts of things.

11 MR. SNYDER: I don't know that that's the case.

12 THE COURT: Well, you said you agreed with me an
13 hour ago. Which part is the case, that you had a contract
14 with LSM?

15 MR. SNYDER: That all the components that Wal-Mart
16 was looking for are present.

17 THE COURT: I don't know whether LSM had them or
18 not, but the premise of your argument in your brief is that
19 our managers thought they were entering into a contract with
20 LSM, and they were in fact entering in a contract with Webb
21 Candy. My point is that isn't true, they were entering into
22 a contract with LSM. So if there is some fraud there, it
23 isn't in the identity of the contracting party because they
24 are contracting with exactly who they were led to believe
25 they were contracting with, it seems to me. So it has to be

1 some other sort of fraud. It's hard for me on -- if I'm
2 right about that or whether I'm right or not, if it's what I
3 believe, it's hard to know what to do with a summary
4 judgment motion that's centered on the fact that you led us
5 to believe that we were contracting with LSM when we were
6 contracting with Webb Candy when I don't think you were
7 contracting with Webb Candy. I think you did contract with
8 LSM. So if there is fraud, it's a different sort of fraud
9 than is being presented in the motion for summary judgment.
10 That's the thing I'm getting stuck on.

11 MR. SNYDER: Well, the analogy that someone told
12 me -- and if it bombs, I will blame this other person -- you
13 go into a McDonald's and you misrepresent who you are, I
14 want to order lunch and my name is John Smith and it's not,
15 they don't care. It doesn't matter. That's not a material
16 part of this. But if you go into the store that has the
17 golden arches and says "McDonald's" on the front and you go
18 up and order your lunch and it's not a McDonald's store,
19 it's somebody else's store that's purporting to be
20 McDonald's, that's material to you because you don't know
21 who -- you know who McDonald's is. You have eaten there a
22 bunch of times before perhaps. But you don't know who this
23 imposter is. That's why it's material.

24 THE COURT: Here's the problem with the analogy --
25 you go back and yell at the person who gave it to you -- is,

1 A, you ended up getting a McDonald's hamburger. You got
2 exactly the hamburger you thought you were buying, and it
3 was just as delicious as you wanted it to be and later on
4 you found out it wasn't a McDonald's hamburger, even though
5 you couldn't tell the difference when you were eating it.

6 And, B, your contract actually wasn't with
7 McDonald's, meaning that if you didn't get what you'd
8 ordered from McDonald's, you had a right to sue McDonald's.

9 MR. SNYDER: But McDonald's couldn't compel me --
10 after I find out that that sandwich was not a McDonald's
11 sandwich, they can't compel me to pay for it, I don't think.
12 That's the whole point here. What they are trying to do is
13 compel me to pay for something that I didn't actually
14 bargain for.

15 THE COURT: We're going to probably strangle
16 ourselves in this analogy here. But where have you been
17 harmed? Your contract was with McDonald's, and you got
18 exactly what you thought you were going to get from
19 McDonald's in terms of the product itself. Where is the
20 daylight there? Where is the --

21 MR. SNYDER: I don't have to be harmed. I don't
22 have confidence that they are using beef that has been
23 inspected; I know McDonald's does because that's what
24 McDonald's does. I don't know what this imposter is doing.
25 I don't know if this lip balm from a source in China has

1 lead in it or something else that a lot of products from
2 China have in it. It has never been tested.

3 I can't be compelled to buy that stuff, is what my
4 argument is in this case. That's what they are trying to do
5 in this case, they are trying to compel me to buy something
6 that they misrepresented to me.

7 THE COURT: Okay. Let me talk to Mr. Moore.

8 What I will do is let's just take about a
9 10-minute break so that Deb can have a chance to stretch,
10 and then I will come back and talk to Mr. Moore.

11 THE CLERK: All rise.

12 (A brief recess was taken.)

13 THE CLERK: All rise.

14 THE COURT: Please be seated.

15 All right. Mr. Moore, if I could talk to you,
16 please. So, Mr. Moore, I'm finding myself asking questions
17 about the case that weren't really in the briefs. You know,
18 the main fraud claim against your client is when they were
19 out there and they were -- as it's briefed and when they
20 were out there, they were calling these stores and they were
21 saying they were with Little i or they were with Little m
22 (sic), they were lying. The result of it is that they were
23 tricking Wal-Mart into thinking they were entering into
24 contracts with LSM or Little i when in fact they were not.
25 And my reaction to that is exactly what they were doing:

1 They were entering into contracts with LSM and Little i, so
2 there is no fraud. But you never say that anywhere in your
3 briefs. It means I'm really wrong or it didn't occur to
4 you. Do you disagree with me? Do you think, in fact, Webb
5 Candy has contracts with all these people? I guess you do
6 because you brought a breach of contract. How does Webb
7 Candy have contracts with these people?

8 MR. MOORE: Your Honor, I don't disagree with you
9 on that issue. I didn't put it that clearly in the brief,
10 but what I argued is that the orders and the invoices are
11 the contracts and those invoices are Licensed Sports
12 Marketing.

13 THE COURT: But then doesn't that mean that I have
14 to dismiss the contract claim in this case insofar as it's
15 brought by Webb Candy? It would allow LSM to pursue
16 contract claims but not Webb Candy.

17 MR. MOORE: That would be the extreme, yes, Your
18 Honor.

19 THE COURT: Or we would call it the logical
20 implication.

21 MR. MOORE: Right.

22 THE COURT: One or the other.

23 MR. MOORE: Right. As Mr. Snyder mentioned, we
24 have the quantum meruit unjust enrichment claim, and that
25 would come into play if there were no contracts.

1 THE COURT: I don't know what Webb Candy could do,
2 but if I'm right about that, that these contracts are
3 contracts between LSM and Wal-Mart, then the fraud that's
4 put forth in the briefs at least didn't exist because the
5 Wal-Mart managers were contracting with exactly who they
6 thought they were contracting with.

7 Now, Mr. Snyder had suggested today a claim that,
8 well, even if they were contracting with who they thought
9 they were contracting with, because of the way Wal-Mart
10 works, they would have assumed the product they were buying
11 was vetted and approved by a Wal-Mart buyer and that that
12 could have been the fraud, but that's not what's briefed. I
13 mean, that's not -- I can only rule on what's briefed. So
14 that would mean -- if I'm right about this, that would mean
15 two things -- that is, the breach-of-contract claim would be
16 LSM's in this case, not Webb Candy's; although, you may have
17 a quantum meruit case; and also that no one could bring
18 Little i-related claims because Little i isn't in the case.

19 MR. MOORE: You are correct, Your Honor. You
20 asked Mr. Snyder this, and I believe that all of the
21 payments at this point that the plaintiffs are seeking are
22 LSM invoices at this point in time. Through the discovery
23 originally our claims were for \$650,000, as I explained in
24 the brief.

25 THE COURT: Right. You discovered you got ripped

1 off by Little i perhaps and so to the extent you have unpaid
2 Little i invoices, that seems to be because of what Little i
3 did, not because of what Wal-Mart did.

4 MR. MOORE: That's what it appears to be. Yes,
5 Your Honor.

6 THE COURT: So we have a case here, as far as you
7 know, entirely made up of LSM invoices?

8 MR. MOORE: Right.

9 THE COURT: All right.

10 MR. MOORE: There may be a few stragglers in
11 there, but for the most part, LSM.

12 THE COURT: You sort of in your brief nod to this,
13 but it's never really explained. Was there any difference
14 between your relationship -- let me ask you to clear up this
15 one thing about the timing, first of all. I understood from
16 everybody's briefs that you had a deal with Little i, and
17 then on November 25th you replaced it with a deal with LSM.

18 Now, for the first time today, at least this is
19 the first time I understood it, Mr. Snyder says, no, you
20 were selling under both names from the beginning. Help me
21 with this.

22 MR. MOORE: Your Honor, when I looked at those,
23 and listening to Mr. Snyder's argument -- and you asked
24 Mr. Snyder how would the salesperson know who to say he is
25 with, either Little i or LSM. When Webb is paying Little i

1 five percent and LSM three percent, wouldn't it be better to
2 be from LSM. And if you look at the two invoices that
3 Mr. Snyder provided to the Court today, the LSM one, the
4 salesperson is Tom Easterly on September 29th. The Little i
5 one is also Tom Easterly on the same day. So, Your Honor, I
6 don't know the answer, but I would say that that's a mistake
7 on the invoice myself. But I don't know the answer to the
8 question.

9 THE COURT: Mr. Snyder says there is a steady
10 stream of these throughout the end of September and into
11 October.

12 MR. MOORE: I would have to go back -- I'm sorry.

13 THE COURT: If what you have told me is true --
14 I'm not suggesting you are lying. I'm suggesting there may
15 be a mistake here. If what you told me is true, then we
16 shouldn't have any LSM invoices, invoices going out from
17 LSM, until something like November 25th or 26th.

18 MR. MOORE: The formal agreement was end of
19 November of '08.

20 THE COURT: And what about an informal agreement?

21 MR. MOORE: Your Honor, I don't know the answer to
22 that. I know there was some overlap between LSM and
23 Little i. And I thought it happened -- if memory serves me
24 correctly, it was around the end of October, beginning of
25 November time frame.

1 THE COURT: I understand that witnesses get fuzzy
2 about dates, but you'd think that if Webb Candy was using
3 both numbers from the beginning, they would remember that,
4 for one thing, because, as I've talked about, the
5 salespeople would have had some way of knowing who they were
6 saying they were with when they were making these calls.

7 Were these cold calls, I assume, mostly?

8 MR. MOORE: They were, Your Honor. The
9 salespeople did testify, they said when they were with
10 Little i, they said I'm so and so with Little i. Then when
11 they went to LSM, they said I'm so and so with LSM.

12 THE COURT: That's just odd, though, because --
13 I'm really having trouble just reconciling all this. That's
14 what I read in the briefs. It sounded like the salespeople
15 themselves thought there was a time they were with Little i
16 and there was a time they were with LSM and the one followed
17 the other. But Mr. Snyder presents these invoices that have
18 people making sales on the same day in September under both.
19 So it's just a head scratcher.

20 Was there a difference between the relationship
21 between Webb Candy and Little i on the one hand and Webb
22 Candy and LSM on the other hand?

23 MR. MOORE: Yes, there was.

24 THE COURT: What was the difference?

25 MR. MOORE: The difference, besides the dollar

1 amounts --

2 THE COURT: Right, I know the commissions were
3 different.

4 MR. MOORE: Little i was going to do all of the
5 financial transactions with Wal-Mart. In other words,
6 Wal-Mart would pay it to the Little i bank account.
7 Little i then would do a reconciliation, send it back to
8 Webb Candy.

9 With Licensed Sports Marketing they opened up this
10 joint lockbox account.

11 THE COURT: Right.

12 MR. MOORE: And they both had access to that
13 account, both Webb Candy and Licensed Sports Marketing. And
14 more so, and I think this is the most important thing that
15 leads to the joint venture, is Wal-Mart has -- and I don't
16 know what they call it, but you can tap into their system if
17 you are a vendor and see where your payments are lining up
18 and when they are going to come. Little Sports Marketing
19 (sic) did not allow Webb Candy to view that.

20 THE COURT: Little i you mean?

21 MR. MOORE: Little i, yes. I'm sorry. Licensed
22 Sports Marketing did. They shared that information. They
23 allowed Webb Candy to get on that system with them.

24 THE COURT: Well, we now have some reason to know
25 why Little i wasn't letting Webb Candy onto it.

1 MR. MOORE: That very well could be.

2 THE COURT: But was there a difference in terms of
3 -- I mean, there was some suggestion in the briefs that this
4 joint venture was supposed to include Webb Candy's
5 salespeople trying to push LSM products as well as Webb
6 Candy's products.

7 MR. MOORE: Right.

8 THE COURT: Is there evidence that they actually
9 did that?

10 MR. MOORE: Well, there is evidence -- I don't
11 know if it's in the record, Your Honor, but what Licensed
12 Sports Marketing did have for product was college lip balms,
13 so University of Kentucky, for example. And those products
14 were products that Webb was going to sell if they could. I
15 don't know if they did sell any. I do know -- I have seen
16 them in the warehouse. There are boxes of them.

17 THE COURT: But there is no evidence in the record
18 that the Webb Candy employees ever sold any LSM products?

19 MR. MOORE: Right. Now, they had the opportunity
20 to and the right to, but --

21 THE COURT: Do we know if they ever tried to sell
22 LSM products? Is there evidence in the record?

23 MR. MOORE: There is nothing in the record that I
24 am aware of.

25 THE COURT: When, in your view, does Wal-Mart

1 first -- you rely a lot upon this November 4th e-mail. But
2 the November 4th e-mail to Mr. Malley doesn't say a word
3 about Licensed Sports Marketing.

4 MR. MOORE: Correct.

5 THE COURT: When, in your view, does Wal-Mart
6 first -- obviously, they agree that they are informed of it
7 on January 20th. When, in your view, are they informed of
8 the relationship between LSM and Webb Candy?

9 MR. MOORE: Your Honor, I don't have any evidence
10 to the contrary of January 20th --

11 THE COURT: Okay.

12 MR. MOORE: -- other than the fact that when the
13 invoices are coming in, when the orders are coming in under
14 Licensed Sports Marketing, you know, the products shows up
15 and it's Webb Candy. As you mentioned, the label says
16 distributed by.

17 THE COURT: The problem with that argument,
18 though, it gets you only part of the way, which is this
19 stuff doesn't happen until the order has already been
20 placed. So it's not a -- if you need to argue that you
21 should have realized when our salesperson is talking to you
22 that they are really talking to you on behalf of Webb Candy,
23 not LSM, and the reason you should have known that is
24 because after you get the product if you look at it, you
25 will see it says Webb Candy on there, it doesn't work

1 because you don't get the product until you order the
2 product.

3 MR. MOORE: Actually, we do, Your Honor, have
4 evidence in the record that the Apple Valley store called
5 back -- and after the transition from Little i to Licensed
6 Sports Marketing -- and purchased product from the reorder
7 from Webb under the Licensed Sports Marketing, so they would
8 know at that time.

9 THE COURT: Yeah, but that's the Apple Valley
10 store.

11 I just lost my train of thought. There was
12 something that you said that made me want to ask you a
13 question. It will come back.

14 As I understand where Mr. Snyder left off with me
15 is on the issue of authority, that he says that store
16 managers have the authority to buy products directly from
17 vendors, but only from vendors with numbers, which we have
18 all agreed on from the beginning, and only products that
19 have been approved by Wal-Mart corporate. Now, that's where
20 you disagree; is that correct?

21 MR. MOORE: That's a new argument, Your Honor,
22 that has never been put forward that I can tell in this
23 case.

24 And Mr. Wilhelm, the Licensed Sports Marketing
25 owner, testified that that Supplier Agreement or that vendor

1 agreement, it's not product specific. It's just here, you
2 are now an approved vendor.

3 And the way Wal-Mart -- to me the way they argued
4 it was Wal-Mart now trusts that vendor. And it's not
5 necessarily that they go out and they vet every product that
6 that vendor has, but they trust that vendor to be a decent
7 supplier, to go vet the products for themselves that they
8 are going to sell to Wal-Mart. And if that weren't the
9 case, Your Honor, I would think you would have addendums to
10 that Supplier Agreement every time that vendor tried to
11 introduce a new product.

12 THE COURT: I mean, some of these vendors, I would
13 think they would have a constantly shifting array of
14 products they are offering.

15 MR. MOORE: Absolutely.

16 THE COURT: I certainly understand when the
17 products are coming to the distribution center, obviously, a
18 buyer at Wal-Mart is buying them. Somebody has to buy them
19 from the distribution center.

20 Didn't you quote something, I don't remember if it
21 was in a Wal-Mart U handbook or what it was that,
22 specifically talked about postcards and --

23 MR. MOORE: School imprint items. That's in the
24 Wal-Mart University document about 70-type.

25 THE COURT: Okay. I couldn't follow what

1 Mr. Malley and the investigator whose name I'm forgetting --
2 and I know you cited testimony from them that said they
3 don't know what they are talking about or they are not very
4 familiar with the 70-type, but what do you understand the
5 70-type ordering to be and what they were -- I just didn't
6 understand what they were saying. They were saying this
7 isn't a buying mechanism, it's a something mechanism.

8 MR. MOORE: Yeah, I didn't understand it either,
9 Your Honor. What our clients were under the impression of
10 when they got this from Luke, the manager of the Apple
11 Valley store, when they went in on that initial meeting,
12 Luke said I can buy the product and it goes through this
13 70-type procedure, and he explained that 70-type procedure
14 to our clients. And that's how they understood that the
15 products got ordered at the store level, was through this
16 70-type procedure.

17 THE COURT: Well, that's right, because he is --
18 and I know we're dealing with one guy at Apple Valley, but
19 he is saying to Webb Candy, who he knows doesn't have a
20 vendor ID number, that I can buy that product right there,
21 but I can only buy it if you get a vendor ID number. He
22 didn't say if you get that product approved; although,
23 Mr. Snyder the way he describes it is it's almost as though
24 that -- its just odd because I haven't seen anywhere in the
25 record anything talking about a product ID number. I have

1 only seen the vendor ID number.

2 MR. MOORE: And, Your Honor, another thing is we
3 cited that testimony from Paul Henson where he called Seth
4 Malley about selling that at a national level, selling this
5 lip balm at a national level. And he said, nope, that's a
6 local item, you go up to the local stores and deal with it.
7 We don't deal with that at corporate. You can understand
8 logically why they couldn't. There are so many high
9 schools.

10 THE COURT: Right, there are tens of thousands of
11 high schools and postcards and things like that.

12 And just to nail this down on the question of your
13 position on the misrepresentation, your position is there
14 was not a misrepresentation because when a Webb Candy
15 employee is calling on behalf of this joint effort between
16 LSM and Webb Candy and says they are with LSM, what they are
17 essentially doing is negotiating what's going to be a
18 contract between LSM and the Wal-Mart stores. So the
19 Wal-Mart store is contracting with exactly who they think
20 they are contracting with; that Webb Candy is essentially
21 going to be fulfilling that order, it's going to be doing
22 the work, and it's going to get paid by LSM for doing the
23 work, but no lie has been told in this procedure, right?

24 MR. MOORE: I would agree with Your Honor.

25 THE COURT: Well, I was asking you if that's your

1 position, so you would have to agree with it.

2 MR. MOORE: That is my position, yes. They were
3 with Licensed Sports Marketing and earlier with Little i.

4 We put in the brief the way, you know, Licensed
5 Sports Marketing had always done business at Wal-Mart was
6 very similar. They never had any employees, Licensed Sports
7 Marketing. They were owned by two separate companies, and
8 those employees would call Wal-Mart and they would sell the
9 product to Wal-Mart through Little i. Little i didn't
10 manufacture.

11 THE COURT: The contract would be with Little i or
12 --

13 MR. MOORE: I'm sorry, Licensed Sports Marketing.

14 THE COURT: Well, let's say LSM. The contract
15 would be with LSM, but LSM doesn't make anything. LSM
16 doesn't have any employees. It was one of the holding
17 company's employees that were actually negotiating it.

18 MR. MOORE: Exactly.

19 THE COURT: So it would be very similar.

20 And that would also go to your materiality
21 argument -- that is, if the managers knew that although they
22 had a contract with this vendor, LSM, that really there was
23 a -- they were sourcing it pretty much, that that wouldn't
24 startle or be material to the managers because it happens
25 all the time?

1 MR. MOORE: It happens all the time. We do have
2 testimony in the record that it happens all the time.
3 Wal-Mart, in fact, testified that they don't always buy from
4 the manufacturer of the product.

5 THE COURT: Okay.

6 MR. MOORE: Your Honor, also reliance -- there is
7 absolutely no evidence in this record that a store manager
8 ever felt he was duped or ever came in and said, you know, I
9 relied on that to our detriment.

10 THE COURT: Well, it's one of the things -- I
11 think you are all going to have to try this case if you
12 can't settle it. It's going to be one of the -- boy, it's
13 going to be really hard to know who the jury should cheer
14 for on this one. You have somebody making a million dollars
15 off the deal complaining about the deal. And we have your
16 client who were not being terribly forthcoming when they
17 were dealing with it. Jurors may even conclude that they
18 were lying. You know, it won't be an inspiring day to serve
19 on a jury, but if we have to try it we have to try it.

20 Let me ask you about the question of knowledge --
21 that is, whether these store managers should have known that
22 Webb Candy was basically, you know, doing 90 percent of
23 this, and although the contract was with LSM, it was Webb
24 Candy that was doing all the work behind the scenes and
25 that.

1 We have already talked about these things they
2 would know from after the product is delivered, but not only
3 would that be after the product is delivered, but there
4 wouldn't necessarily be anything startling about that in
5 that, as you said, it's not uncommon for licensed vendors to
6 sell products they have sourced elsewhere. So if ABC
7 company is a licensed vendor and I buy whatever, toenail
8 clippers, from ABC company, the fact that they would have
9 Acme on them wouldn't startle me as a store manager because
10 a lot of people, I assume, are sourcing things from other
11 people.

12 So that wouldn't tell the store managers
13 necessarily that they are dealing with Webb Candy because
14 they could be dealing with LSM and LSM could be getting the
15 stuff from Webb Candy, right?

16 MR. MOORE: What it would tell them is that
17 product is distributed by Webb Candy. And I think that's
18 the crux of Wal-Mart's argument, is that somehow Webb Candy
19 supplied this product when they shouldn't have. And I don't
20 see any support anywhere as to why Webb Candy couldn't
21 supply product through Licensed Sports Marketing or Little i
22 for that matter.

23 THE COURT: Well, Webb Candy can't have direct
24 contracts with Wal-Mart stores because they are not
25 authorized to. Mr. Webb knows that because he doesn't have

1 a licensed vendor number, he, Webb Candy, can't contract
2 with a Wal-Mart store to deliver stuff to a Wal-Mart store,
3 true?

4 MR. MOORE: True.

5 THE COURT: He needs to get a vendor to make the
6 contract, and then he needs to work through -- he basically
7 has to cycle his products through that vendor to Wal-Mart.

8 The risk for the vendor is that if Webb screws up,
9 Wal-Mart is going to hold LSM responsible. LSM then could
10 turn and hold Webb Candy responsible essentially as its
11 supplier. But that's putting LSM at legal risk because it's
12 the one who is going to be held responsible to Wal-Mart, but
13 in return it's getting its cut. That's why it's taking its
14 cut.

15 MR. MOORE: Right. It's not as if Webb lied and
16 said we have a vendor ID number and here it is and made up
17 some vendor ID number.

18 THE COURT: No, you negotiated contracts. You
19 represented that you were acting on behalf of LSM,
20 negotiating contracts on behalf of LSM, and like I keep
21 saying, that's what came out of this, contracts with LSM.
22 If there was a screw-up here, Wal-Mart could have sued LSM,
23 and LSM could have sued Webb Candy. I don't think Wal-Mart
24 would have had any right to sue Webb Candy, if I understand
25 all this correctly.

1 I'm just looking through my notes here. We have
2 talked about a lot of this stuff, so I'm trying to skip over
3 things.

4 This e-mail on November 4th of 2008, although we
5 spend a lot of time on it in the briefs, ultimately if this
6 is all about LSM invoices are unpaid, it's sort of
7 irrelevant, this e-mail, isn't it?

8 MR. MOORE: Except for the fact that they say
9 nobody knew Webb Candy was involved. I mean, Wal-Mart knew
10 Webb Candy was involved.

11 THE COURT: Was involved with Little i?

12 MR. MOORE: Yeah.

13 THE COURT: But there is no reason from the e-mail
14 that anybody would have known from Wal-Mart that they were
15 involved with Little i?

16 MR. MOORE: Not at that point. Not from that
17 e-mail, correct.

18 THE COURT: All right. You say in your brief, I
19 quoted this, "Alan Webb notified Wal-Mart that it was
20 working with LSM." Now, I just wasn't sure what you were
21 referring to there. But Mr. Snyder says that you were
22 referring there -- that if you trace back the cite to the
23 record, that's this January 20th of 2009.

24 MR. MOORE: Correct.

25 THE COURT: For our purposes today you are

1 conceding that you have no evidence that Wal-Mart was
2 informed that you were working with LSM prior to January
3 20th, 2009?

4 MR. MOORE: Not that I can think of off the top of
5 my head, Your Honor. I can go back and look.

6 THE COURT: You also mention that Wilhelm notified
7 Wal-Mart that he was working with Webb Candy. Is there any
8 reason -- Mr. Snyder says, no, he notified Wal-Mart to
9 direct its checks to an account, but there is nothing that
10 Wal-Mart would have known from that anything about Webb
11 Candy.

12 MR. MOORE: Well, Your Honor, the account is a
13 joint account. I would think --

14 THE COURT: Does Wal-Mart know -- you know, my
15 wife's employer deposits her checks directly into our
16 account. They just get an account number. They don't know
17 who is on the account. They don't know if I'm on the
18 account or anybody else is on the account.

19 Other than that presumption, do you have any
20 reason to believe that by getting this account number from
21 LSM that they would have known they were dealing with Webb
22 Candy?

23 MR. MOORE: The other thing is Wal-Mart's payment
24 system, whatever that --

25 THE COURT: How would it tell Wal-Mart Webb Candy

1 was involved?

2 MR. MOORE: They have to get into the system.

3 THE COURT: If I give you my password to get on to
4 whatever website, the Star Tribune's website, they don't
5 know it's you. All they know is you are logging in under my
6 password.

7 MR. MOORE: That could be.

8 THE COURT: So you don't have any reason to know
9 that the operation of this joint account would have
10 necessarily told Wal-Mart that it was somehow dealing with
11 Webb Candy?

12 MR. MOORE: I mean, I don't have any direct
13 evidence of that, Your Honor, no.

14 THE COURT: Okay. Well, Mr. Snyder also testified
15 that Mr. Wilhelm says that he did not notify -- I did not go
16 back and look at the transcript, but he did not tell
17 Wal-Mart anything about Webb Candy.

18 MR. MOORE: The testimony is Mr. Snyder asked him
19 very specifically did you tell your buyer. Larry Wilhelm
20 hadn't talked to his buyer for quite some time and he said
21 no. So I think that's what Mr. Snyder is referring to.

22 THE COURT: Your ratification argument, as I
23 understand it, is the same one I mentioned to Mr. Snyder,
24 which is Wal-Mart finds out of the arrangement between LSM
25 and Webb Candy on January 20th; that if there was anything

1 fraudulent about that, which you obviously dispute, they
2 know about it on January 20th. From January 20th until
3 mid-March, there are at least numbers of stores that are
4 continuing to sell the Webb Candy product. From the
5 corporate level there is nothing that comes from corporate
6 until three weeks later, February 9th. And even then what
7 comes from corporate is keep selling them if you would like,
8 send them back if you'd like. Corporate only pulls the plug
9 on them in the middle of March. So that course of conduct
10 is ratification. If you discover on January 20th you were
11 defrauded, then within a short period of time you need to
12 pull those products and get them all on trucks?

13 MR. MOORE: Your Honor, I would go back further
14 because even though it was with Little i, Wal-Mart knew of
15 Webb's involvement with these lip balms back in November.
16 And by not telling them back in November, even December stop
17 doing what you are doing, that's a ratification of the
18 contract, Your Honor.

19 THE COURT: Now, Mr. Snyder tells me that
20 Ms. Carter, was it, was an ongoing -- for these purposes I
21 have to take his version of the facts, that she says she was
22 in ongoing conversations with Mr. Webb telling him to stop
23 doing what he was doing.

24 MR. MOORE: Not to stop. The first indication we
25 have to stop selling the product was from Seth Malley on

1 February, right before February 9th, right before his
2 announcement went out to the stores. He testified that he
3 did not tell Webb Candy to stop doing this until that early
4 February date. And knowing about it back in November, they
5 should have told them then, but they went along with it.

6 I think you hit it right on the head, they were
7 making a bunch of money off of this thing, so they kept it
8 in play. They never told him to stop selling it. The
9 testimony with Kim Carter or the conversations there about
10 getting it out of the store or you have got to pull your
11 product, that happened -- as we put in the briefs and in
12 Alan Webb's affidavit -- in that in-person conversation in
13 March.

14 Now, there is e-mail correspondence during this
15 February time frame when the announcement went out where
16 Alan Webb is telling Kim Carter -- or asking her to tell him
17 which stores he needs to contact. And she says you sold it,
18 that's your problem. But that's what's going on there.
19 They never told Webb Candy to stop until early February --

20 THE COURT: Okay.

21 MR. MOORE: -- and didn't tell them to physically
22 get it out of the stores until March.

23 THE COURT: Well, they kept -- it appears -- and
24 Mr. Snyder doesn't deny that it probably happened, it
25 appears there were stores selling Webb Candy-supplied

1 product for several weeks after the February 9th notice went
2 out.

3 MR. MOORE: Right. And we actually put in our
4 brief, Your Honor, there was a store display down in a
5 Georgia store --

6 THE COURT: Yeah, somebody called.

7 MR. MOORE: -- in April.

8 THE COURT: No organization as big as Wal-Mart is
9 going to be perfect. If Wal-Mart on January 21st had sent
10 out a pull order pulling all materials and some manager in
11 some store in Georgia didn't pay attention to that, it
12 wouldn't bother me particularly.

13 But what I think is more significant is nothing
14 goes out until February 9th, and on February 9th what goes
15 out is keep selling it if you want, return it if you want.
16 So that, I think, makes a better case for you for
17 ratification.

18 MR. MOORE: Yes, Your Honor.

19 And also with recission, if you are going to
20 rescind, you have to do it promptly. You can't do it sort
21 of half-heartedly. You have got to rescind the entire
22 thing, and they just didn't do that.

23 THE COURT: If they had acted promptly and
24 rescinded the contract, what would that look like in your
25 view, that they would, what, have to send you a check not

1 just for -- they'd have to pay not just for the product they
2 sold, but they'd have to also give you the profits they made
3 on the product?

4 MR. MOORE: Your Honor, you have two options when
5 you claim to be a victim of fraud: One is to keep what you
6 receive and sue for damages. That's one option. But they
7 didn't take that option because, first of all, they weren't
8 damaged and they -- well, they weren't damaged.

9 The second option is to rescind. And when you
10 rescind, you have to get back to the status quo, put the
11 party at the -- the victim, Your Honor -- Mr. Snyder alluded
12 to us that we go back to the status quo. It's the victim
13 that goes back to the status quo. And Wal-Mart is claiming
14 victim status here.

15 To put them back in the status quo would be to
16 return them to where they were before they entered into
17 these things. They have to return the profit, \$900,000,
18 plus whatever it works out to be, and the product that they
19 still have in the warehouse. That would put them back --
20 actually, what they would have to return is the whole
21 million eight. We would return to them 923,000, so it's a
22 -- the net effect is they would have to return the profit.

23 THE COURT: Okay. As I said, we don't usually
24 have this come up in context where the defrauded person made
25 money off the fraudulently-induced contract. It usually

1 doesn't work that way.

2 MR. MOORE: You are right, Your Honor.

3 I would like you to address -- *Fouquette* is, I
4 believe, how it's pronounced. We cited it in the brief.

5 The case didn't go into great detail in this, but it was a
6 situation where the investor had two investments going on
7 with the same person.

8 THE COURT: Right, and he wanted to revoke the bad
9 one and keep the good one.

10 Well, this is odd. Why doesn't Wal-Mart say when
11 -- on January 20th when they get this information, why don't
12 they say you can't go about doing it this way, we're not
13 going to do business with you, we're not going to do
14 business with any of our vendors who source your products
15 and then sell off the rest of it and just send you a check
16 and be done with it? Why does Wal-Mart, who has made a
17 million bucks off of your company's products, why are they
18 so adamant in wanting to return them and to sort of cut
19 their profits off at one million instead of making another
20 million off the products?

21 MR. MOORE: I've asked myself that a hundred
22 times, Your Honor. And the only thing I can come up with,
23 Your Honor, is it's ego. Mr. Snyder said somehow Webb got
24 around the system. I don't think it got around the system.
25 But Kim Carter -- and you had to be there for the -- what's

1 the word -- for the non-verbal communication that was going
2 on there, but she seemed to take this extremely personally
3 for some reason. And that's all I can muster on this, is
4 that there is some sort of ego play going on here because it
5 doesn't make sense to me.

6 THE COURT: Now, if we ended this lawsuit today
7 and everything just -- now, one thing I can't understand is
8 you talk about this product being worthless. I don't
9 understand why this product is worthless.

10 Suppose Wal-Mart returns to you the lip balms of
11 the Duluth Denfeld Hunters. Okay? And so they are not
12 being sold up in the Duluth Wal-Mart anymore. So you've got
13 now a case of lip balms with Duluth Denfeld Hunters.
14 There's a hundred stores in Duluth that would sell Duluth
15 Denfeld Hunters. Why don't you just put them in another
16 store and make money off the returned product? Why are you
17 letting it sit and rot in the warehouse?

18 MR. MOORE: I think that's easier said than done,
19 Your Honor.

20 THE COURT: You sell stuff through, what,
21 Walgreen's, CVS. Why don't you go up to the Walgreen's
22 store in West Duluth and have them put Duluth Denfeld Hunter
23 lip balms on it?

24 MR. MOORE: Well, I know that Webb Candy has tried
25 to sell to Walgreen's. I don't know about Duluth. I know

1 they have tried to sell product through Walgreen's.

2 THE COURT: I just don't understand why having a
3 warehouse full of high school branded lip balm and hand
4 sanitizer, which does not have an expiration date worth
5 talking about at least, why there is no chance to mitigate
6 damages there, why there isn't any chance to go out and sell
7 that stuff. You've got salespeople who got on the phone to
8 Wal-Mart stores. Why can't those same salespeople go a
9 little further in the phone back and call other stores?

10 MR. MOORE: I would assume the mom and pop shop in
11 Duluth isn't going to buy 1,000 of these lip balms.

12 THE COURT: They might buy 500 or 200. You just
13 don't know. You know, in a lot of cities like Duluth
14 Wal-Mart isn't the only store in town.

15 Your brief sort of in a footnote sort of says that
16 stuff is all useless to you. I understand you make the
17 point that to rebrand it would cost more than it's worth.
18 If you are selling these things at 60 cents, I'm sure
19 rebranding would cost more than that. I don't understand
20 why -- Mr. Snyder, one of the arguments he makes, is you
21 need to mitigate damages. I think it would be his burden to
22 show at trial that you could have and didn't mitigate
23 damages. But I'm not sure why the concept isn't correct --
24 that is, Webb has got an obligation here to have its
25 salespersons to try to get other people to sell this stuff

1 and sell it and mitigate its damages.

2 MR. MOORE: You are right, Your Honor, they do
3 have an obligation. And the way that -- I guess the way
4 Webb has looked at it is we're going to have to unlabel all
5 of these and then relabel them.

6 THE COURT: I don't know why -- like I said, if
7 you have got Duluth Denfeld Hunters lip balm, you have
8 probably got a hundred stores that might be interested in
9 selling Duluth Denfeld Hunter lip balm. Why would you have
10 to repackage them? It would be an issue to try. It's one
11 of many things that I don't think I can grant summary
12 judgment on.

13 Let me ask you this. I started to ask you this.
14 If we stop right now and everybody went home with what they
15 have got, does your client lose -- I don't mean does he lose
16 profits he's expecting, but does he lose any money? I have
17 got to qualify it in a second way. I realize he has had
18 money perhaps stolen from him by Little i, but does he lose
19 any money? Is he out of pocket anything on this?

20 MR. MOORE: Well, he has shipped the product to
21 Wal-Mart, 63 cents --

22 THE COURT: Let's say we just stop right now and
23 Wal-Mart keeps or throws away the stuff it has in its
24 warehouse and you resell or throw away the stuff you have in
25 your warehouse. Mr. Snyder does this calculation in his

1 brief, which essentially is, you know, they have paid you --
2 although Little i took some of it, but they paid you 900
3 some thousand dollars. Your profit margin also is about 50
4 percent. So basically you have already -- you are not out
5 anything in terms of out-of-pocket costs.

6 What this lawsuit is for you, as it is for
7 Wal-Mart, is what additional profit, if any, you are going
8 to make. But you have already made some profit on this deal
9 even if we stop right now.

10 MR. MOORE: There has been some profit.

11 The other thing is Wal-Mart has sold -- and in
12 their briefs they don't really address this, but there is
13 \$150,000 and some change out there that is not in their
14 warehouse, and it appears as though that product was sold.

15 THE COURT: Yeah, well, they say that that's not
16 true, that you are double-counting. The 152,000 was payment
17 for product that after the pull order is now in the
18 warehouse. I had a little trouble following all the numbers
19 on that.

20 MR. MOORE: I can imagine. They get a little
21 tricky. But on that they are not included in the warehouse
22 because when you do the math on it, the numbers -- if you
23 take the amount sold and shipped, the amount paid, and
24 that's the whole amount, the 923,000, subtract out the
25 amount of returns, that was 380 some odd thousand, then

1 subtract out the 362,000 that's sitting in Wal-Mart's
2 warehouse, there is still \$150,000 there.

3 THE COURT: Well, I'm not doing damages today,
4 believe me.

5 Okay. Did you have anything more you wanted to
6 say, Mr. Moore?

7 MR. MOORE: No, I think that pretty much covers
8 the case, Your Honor.

9 THE COURT: Okay.

10 Mr. Snyder, is there anything more you wanted to
11 add?

12 MR. SNYDER: Your Honor, I just want to revisit
13 what seems to be the central issue that, at least from my
14 case, you're concerned about and that is, well, don't they
15 have an agreement with LSM and doesn't that end the whole
16 discussion. And I don't think it does --

17 THE COURT: To be clear, I don't think it ends the
18 discussion. I think you still have a fraud claim. It's
19 just a different fraud claim than the one that at least is
20 featured or prominent in your briefs.

21 Your briefs -- your fraud claim -- the drum you
22 continue to beat is we were misled about who we were dealing
23 with, who we were contracting with. We thought we were
24 entering into a contract with an approved vendor, we
25 weren't. We were entering into a contract with an

1 unapproved vendor. I don't think that fraud claim works or
2 at least I don't think it works on summary judgment.

3 I think you do have a fraud claim, which has been
4 developed in front of me here today -- again, if you meant
5 this to be in your brief, I just didn't pick it up -- which
6 is not only did we think we were dealing with a vendor, it's
7 not only about the identity of the vendor, we thought we
8 were buying approved product. We weren't buying approved
9 products. And that's a different fraud claim. You can make
10 that claim if you want. I will let you try that claim. But
11 that claim hasn't been teed up for me on summary judgment.

12 MR. SNYDER: Well, the issue that has been teed
13 up, it is the identity issue, and that provides the basis
14 for summary judgment in this case.

15 Your Honor, it's no different than if next year
16 when you are interviewing law clerks someone comes in and
17 says my name is Sarah Jones and I am valedictorian at
18 Harvard, here's my resume and it's not Sarah Jones. It's
19 somebody else. You hire that person. You have a contract
20 with that person. You don't have a contract with Sarah
21 Jones. You have a contract with whoever you hired. And now
22 late into the term you discover --

23 THE COURT: I'm sorry, I don't follow. They came
24 to you when Mr. -- I forget the name. Henson, was he one of
25 the people, the national sales manager?

1 MR. SNYDER: Yes.

2 THE COURT: Okay. Mr. Henson calls the store
3 manager. He says, I'm with LSM. I essentially want to
4 convince you to enter a contract with LSM for some of these
5 lip balms. What comes out of that is a contract with LSM
6 for those lip balms. So the contract is exactly with who
7 the manager thought the contract was with. The product is
8 exactly what the manager thought he was getting, except for
9 the possibility of not being approved, but in terms of he is
10 getting lip balm. I don't understand the fraud in that.

11 MR. SNYDER: It's not a contract with LSM because
12 LSM does not own this product. LSM is not making the sales
13 calls. LSM is not making the offer that's being accepted by
14 the store manager. That's the contract, the offer of
15 acceptance --

16 THE COURT: The person making the offer is acting
17 on LSM's behalf, with LSM's knowledge, with LSM profiting in
18 front of it, going out with LSM invoices. I mean, I don't
19 understand -- if you check the transcript, I think you will
20 find this: I asked you very early on in this argument did
21 you have a contract with LSM and you said yes, they did have
22 a contract with LSM.

23 MR. SNYDER: That is what the contract says. Just
24 like if you hire that clerk, even though the person at
25 Harvard that loaned out her name and her resume to your

1 clerk, you know, you don't have a contract with that person.
2 You have a contract with the person that's sitting in your
3 chambers, right? That's the same exact thing as the
4 identity.

5 THE COURT: I think right now today you have
6 contracts, lots of them, with LSM.

7 MR. SNYDER: That's whose name is on the invoices.

8 THE COURT: That's who you have a contract with, I
9 believe. Now, if you want to try it, we will try it. The
10 jury can decide who you have a contract with. But when your
11 manager gets called by someone who says I'm with LSM, I want
12 you to make a contract with LSM, an invoice goes out from
13 LSM, the check comes back to LSM, I think you've got a
14 contract with LSM. To the contrary, I don't think you have
15 a contract with Webb Candy.

16 MR. SNYDER: We have a contract with someone who
17 is supplying products to us, right. Put aside the
18 designation. We have a contract with someone who is
19 supplying that product. We think it's one entity. It's
20 actually a different entity. So we have a contract, but
21 it's a voidable contract. That's the whole point of the
22 restatement.

23 THE COURT: No, you have a contract with LSM. LSM
24 has the legal obligation to supply lip balms to you. They
25 essentially delegate that without your knowledge to Webb

1 Candy. But if the lip balm doesn't show up, I think your
2 claim is against LSM, not against Webb Candy. Webb Candy is
3 a stranger to you. You've never heard the words "Webb
4 Candy."

5 MR. SNYDER: Either way it's a voidable contract
6 because the real supplier here is Webb Candy. I think we
7 can agree to that. The real supplier here is Webb Candy,
8 the company that we have rejected numerous times.

9 THE COURT: Well, if the store manager is thinking
10 I'm not just entering a contract with LSM, but LSM is
11 guaranteeing to me that LSM will be making these lip balms,
12 not that they are getting them from someone else, then you
13 are right, you didn't have the contract. But I didn't see
14 evidence of that in the record.

15 I mean, at the end of the day, your store managers
16 are getting exactly the product they thought they were
17 getting, and their contract was with exactly the person they
18 thought they were contracting with. I just don't see a
19 fraud claim. Now, you may have better luck with a juror
20 than me, but I just -- Mr. Snyder, sometimes I am like
21 everybody else, I make mistakes. Sometimes I just don't see
22 things even that are obvious. I just really, really have
23 trouble seeing Wal-Mart's problem here. They got what they
24 thought they were getting. Their contracts are with whom
25 they thought they were contracting with. They made a ton of

1 money off of this. I don't understand why we're litigating
2 this. But I'm going to let you make your case to the jury.
3 I can't award summary judgment based on my understanding of
4 the case. If I've screwed this up, I apologize to you; it
5 happens. I just don't see the problem here.

6 MR. SNYDER: The whole restatement argument goes
7 away, that you are contracting with someone you think is a
8 millionaire. He is not a millionaire.

9 THE COURT: I don't know how many times I can say
10 it. You are contracting with exactly who you thought you
11 were contracting with. Your manager thought he was entering
12 a contract with LSM. You have a contract with LSM. You
13 have a contract with LSM. That is who you thought you were
14 contracting with. That's who you are contracting with.

15 MR. SNYDER: And it's voidable because the true
16 supplier is not LSM.

17 THE COURT: If part of that contract is not just
18 that I am contracting with LSM, but LSM has to be personally
19 supplying that, not essentially getting someone else to
20 fulfill their obligations for them, then you are right, it's
21 a breach of contract. But I don't see that in the record or
22 the briefs that I've got. That's just not the way this has
23 been teed up. So, you know, I'm sorry, that's the way I see
24 the case. All right? Thank you, Mr. Snyder.

25 All right. So for the reasons I've discussed, I

1 can't grant summary judgment on this case to either side. I
2 mean, there's a number of facts that are in dispute here,
3 and we haven't even talked about issues like damages where I
4 can't even follow the arguments of the parties, much less
5 say that there is nothing in dispute. There is an issue of
6 mitigation, which has to be tried.

7 Mr. Snyder and I haven't talked about this, but
8 his argument against Webb Candy's summary judgment motion,
9 for example, that Webb Candy has to show that contracts were
10 formed with -- each of these things was in fact a contract,
11 I agree with. Webb Candy can do that through overall
12 testimony. It doesn't have to have an employee say I
13 remember each of those 100 contracts. But it at least has
14 to have testimony like that from Mr. Webb about what the
15 practice of Webb Candy was, and the jury has to decide
16 whether they believe it. But on both sides there is just a
17 ton of things that have to be tried here.

18 I think this is going to be an extremely difficult
19 case to try. I have no idea how we'd even start to instruct
20 the jury on this. I have no idea how to explain to the jury
21 how this is a fraud claim when Wal-Mart made a million
22 dollars off of being defrauded. But, you know, it's not a
23 jury friendly case for either of you. But you have the
24 right to try this claim if you want to try this claim.

25 So I will deny the summary judgment motions. I

1 will have my calendar clerk get ahold of you. We will get
2 this on the trial calendar I suspect for July or August
3 probably given where we're running right now. I will
4 probably have some early deadlines, and we will have to have
5 an early and long pretrial conference because there are a
6 number of issues that are hard to instruct the jury on and
7 how to try just because it's such an unusual case. But we
8 will cross that bridge when we come to it.

9 Thank you for your help with the case. I will
10 have my calendar clerk get in touch with you today or
11 tomorrow, and we will get the thing set up for trial. Okay?

12 THE CLERK: All rise.

13 | (Court adjourned at 11:30 a.m.)

14 | * * *

16 I, Debra Beauvais, certify that the foregoing is a
17 correct transcript from the record of proceedings in the
18 above-entitled matter.

20 Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR